Supreme Court, U.S.
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No. 99-

CORRECTED COPY

IN THE SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the regulatory conduct of a nominally private secondary school athletic association, which "establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee," *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 190 F.3d 705 (6th Cir. 1999) (Merritt, J., dissenting from the denial of petition for rehearing *en banc*), and whose "membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign," *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), constitutes state action under the Fourteenth Amendment and under 42 U.S.C. § 1983.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brentwood Academy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 3-A) was entered on June 21, 1999, and is reported at 180 F.3d 758 (6th Cir. 1999). The order of the court of appeals denying the petition for rehearing *en banc* was entered on August 30, 1999; that order and the dissent from the denial of rehearing *en banc* (App. 1-C) are reported at 190 F.3d 705 (6th Cir. 1999). The opinion of the United States District Court for the Middle District of Tennessee (App. 1-B), granting petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp. 2d 670 (M.D. Tenn. 1998).

JURISDICTION

The Sixth Circuit entered its judgment on June 21, 1999. Petitioner timely filed a petition for rehearing *en banc* on July 2, 1999. On August 30, 1999, the court of appeals issued its decision and order denying petitioner's petition for rehearing *en banc*. App. 1-C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 are set forth at p. 1-D of the Appendix.

STATEMENT OF THE CASE

The primary underlying constitutional issue in this matter is petitioner's facial and as applied First Amendment free speech challenge to the Recruiting Rule of the Tennessee Secondary Schools Athletic Association (TSSAA). The case is brought under 42 U.S.C. § 1983, and federal jurisdiction exists under 28 U.S.C. §§ 1331 and 1343.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, TSSAA is a nominally private association composed primarily of public schools and local public school officials and governed exclusively by public high school principals, assistant principals or certain qualified public school superintendents. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee.

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually for any reason. The district court held that the Recruiting Rule violated the First Amendment both facially and as applied. In reversing, the Sixth Circuit held that the regulatory conduct of TSSAA in formulating and implementing the Recruiting Rule did not constitute state action. The issue presented in this petition is the state action status of the regulatory conduct of TSSAA.

The TSSAA. Like comparable organizations in other states, TSSAA is a nominally private association of public, independent, and parochial secondary schools from across Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools comprise 84% of the voting membership; independent and parochial schools comprise 16% of the voting membership.

The purpose of TSSAA, as set forth in Article I, Section 2 of its Constitution, is "to stimulate and regulate athletic relations of the secondary schools in Tennessee." App. 5-B. TSSAA rules and regulations are enacted by its

Legislative Council, a nine-member body elected by popular vote in each of nine electoral districts and composed exclusively of public high school officials. TSSAA's administrative authority lies with a Board of Control, similarly elected by popular vote and also exclusively composed of public high school officials. Eligibility for election is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. *Id.*

Since 1925, the Tennessee State Board of Education (SBE) has recognized the functions of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. App. 10-B. In 1972, by rule, SBE officially designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." *Id.*

In 1972, SBE approved the then-current rules and regulations of TSSAA (including the Recruiting Rule) and reserved the right to review and approve the appropriateness of future changes, a power it regularly exercised. App. 10-B—11-B, 23-B—26-B. SBE viewed TSSAA as "the agency [designated] to govern secondary athletics for the [SBE]," reaffirming "the [SBE's] decision to delegate responsibility for management of secondary school athletics to TSSAA." App. 24-B—25-B.

In sum, SBE recognized that "TSSAA works as an agent on behalf of the State Board of Education." App. 25-B. SBE's Executive Director noted that "[c]ompetitive athletics is a big part of the high school experience" and that TSSAA "manages these activities as sanctioned by the State Board of Education." App. 25-B—26-B.

In 1995, apparently in response to court cases holding TSSAA's regulatory conduct to be state action, SBE adopted the following rule: "[SBE] recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition. [SBE] authorizes the public schools of the state

to voluntarily maintain membership in [TSSAA]." App. 26-B.

Under the 1995 revision, SBE no longer "designated" TSSAA as the official organization for supervision and regulation of secondary school athletics but instead "recognized" TSSAA's long-held role as being of "value." Further, the 1995 revision singled out TSSAA by name to serve in the same role it had traditionally played. The district court found that, even after the 1995 revision,

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.... In short, the rule amendment had no material effect.... Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA.

App. 26-B—27-B.

The Recruiting Rule. TSSAA's Recruiting Rule, like comparable rules in most states, prohibits the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." App. 4-A. The term "undue influence" is defined as "exceeding what is appropriate or normal." App. 6-B.

The terms "appropriate" and "normal" are not defined. App. 37-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that is considered to

constitute "undue influence" per se. These per se rules bar independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually for any reason. App. 40-B. The district court found that the Recruiting Rule's "ban has the effect of preventing any influence on a student, not just 'undue' influence." App. 48-B.

Since the prohibition on initiating contact applies to students "with or without an athletic record," App. 6-B, private schools are at risk if they initiate contact with any prospective students individually—even those without an athletic record—in case those students should, if they enroll, subsequently decide to participate in interscholastic athletics. That risk can only be obviated if the school is willing to bar such students from interscholastic athletics.

Contact with prospective students may not be initiated "by any person connected, or not connected, with the school." *Id.* Private or parochial schools may not contact students enrolled at the public schools, and public schools may not contact private school students. App. 39-B—40-B. A broad exception to the ban on contact applies when either public or private schools contact students enrolled at "feeder" schools.[1] With respect to these "feeder" schools, far-reaching initial and targeted contact is permitted without restraint. As a practical matter, this "feeder pattern" exception does not typically apply to private schools, such as petitioner. App. 40-B. TSSAA has "not explained the purpose for the feeder school exception."[2] App. 47-B.

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[1] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. App. 40-B.

[2] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." App. 47-B—48-B.

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by petitioner's head football coach to all new incoming male students. App. 12-B—13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, been accepted for admission and signed a contract to attend petitioner the next fall. App. 14-B. The letter was followed by a telephone call to each of the students to reaffirm that participation in spring practice was entirely optional. *Id.* The students who received the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA regulations allow the students who received the letters and calls to participate in spring practice. Sending the letters and making the telephone calls, however, constituted a Recruiting Rule violation. In other words, it was legal for the incoming students to participate in practice, but illegal for the school to communicate with them about practice. The specific language of the communications was not determinative of the violation.

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA placed the school's entire athletic program on probation for four years, suspended the football and boys' basketball programs from TSSAA playoffs for two school years (1997-1999), and imposed a $3000 fine. App. 17-B & n.1.

The district court found the Recruiting Rule unconstitutional, both on its face and as applied, as a violation of the First Amendment right of expression and enjoined its enforcement. The Sixth Circuit reversed, holding that SBE's revocation of its official designation of TSSAA to regulate and organize interscholastic athletics negated TSSAA's status as a state actor. App. 12-A—16-A.

Further, the Sixth Circuit held that it was not bound by this Court's "comments" in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which it deemed not to be "controlling." App. 16-A—17-A. In *Tarkanian*, this Court noted that the regulatory conduct of a high school athletic association whose "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign" would be state action. That situation "of course" contrasted with a national association such as NCAA, whose decisions could not fairly be attributed to a single state such as Nevada.

Despite the fact that this Court in *Tarkanian* footnote 13 approvingly cited two high school athletic association cases in which those associations were held to be state actors, and even though one of those cases involved a private school claiming racial discrimination on the part of the association, the Sixth Circuit held that footnote 13 did not apply when a high school athletic association such as TSSAA dealt with a private school such as petitioner. App. 17-A.

The Sixth Circuit rejected the petition for rehearing *en banc* "[a]lthough a substantial minority of the active judges ... voted for en banc review...." App. 2-C—3-C (Merritt, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. THE STATE ACTION DECISION OF THE SIXTH CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF OTHER APPELLATE COURTS THAT HAVE CONFRONTED THE ISSUE

Establishing uniformity of constitutional doctrine is a core basis for the exercise of this Court's certiorari jurisdiction, and the circumstances of this petition clearly satisfy that fundamental criterion. See R. 10(a), Rules of the Supreme Court of the United States. There is a genuine

conflict between the decision under review and decisions on the same issue by other federal and state appellate courts. In his dissent, Judge Merritt stated the point cogently: "We have created an unnecessary conflict in the circuits on an important question of constitutional law. The conflict will have to be remedied now by the Supreme Court." App. 6-C.

Judge Merritt properly noted that the "panel's holding that TSSAA is not a 'state actor' contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action." App. 3-C. Judge Merritt could "find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." App. 4-C.

In support of its state action analysis, the panel cited no appellate authority that deals with the state action status of high school athletic associations from outside the Sixth Circuit. At no stage of this litigation has TSSAA cited appellate authority from outside the Sixth Circuit holding a high athletic association not to be a state actor.

As Judge Merritt correctly stated in his dissent, the state action holding of the panel in this case is inconsistent with the explicit state action doctrine on this issue from the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.[3] It

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[3] See *Moreland v. Western Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir 1978) ("[T]he parties concede that...state action is present."); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) ("There can be no substantial doubt that conduct of the affairs of LHSAA is state action" and the nominally private status of LHSAA "cannot obscure the real and pervasive involvement of the state in the total program") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S, 179, 193 n.13 (1988); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) (though like TSSAA a "voluntary association," IHSA had an "overwhelmingly public character" because of the public character of its membership); *In re United States ex rel. Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (MSHSAA rules were state action because of nature of its composition); *Brenden v. Independent Sch. Dist. 742*, 477

is also inconsistent with controlling doctrine in the Eleventh[4] and Fourth Circuits.[5] Indeed, recent cases from outside the Sixth Circuit have treated the state action status of high school athletic associations as clearly established, settled law: "Actions of voluntary interscholastic associations, of which public schools comprise part of the membership, constitute state action." *Dennin v. The Connecticut Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996). See also *Robbins v. Indiana High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) ("The IHSAA is an organization whose very existence is entirely dependent upon the absolute cooperation and support of the public school system of the State...and is subject to constitutional

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F.2d 1292, 1295 (8th Cir. 1973) (integral involvement of member public school districts in League's decision-making process constituted state action); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (AIA a state actor because the "member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA" and because the AIA "rulemaking procedure integrally involve[d] the member schools and school districts in the decision making process") (cited approvingly in *Tarkanian*, 488 U.S at 193 n.13).

[4] When it split from the Fifth Circuit on October 1, 1981, the Eleventh Circuit adopted as binding the established precedent of the Fifth Circuit prior to October 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Prior to that date, the Fifth Circuit had held that the regulatory conduct of a high school athletic association comparable to TSSAA was state action. See *supra* note 3. For a case that demonstrates that the issue of the state action status of the regulatory conduct of a high school athletic association is regarded as settled in the Eleventh Circuit, see *Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.) (noting that "[t]raditionally, courts have found that high school athletic associations are state actors"), *and cert. denied*, 514 U.S. 1111 (1995).

[5] The role of Virginia in administering its analogous high school athletic association is even more direct than was the case in the other circuit cases, so petitioner regards the Fourth Circuit precedent as supportive but less directly evidencing a split in the circuits. See *O'Connell High Sch. v. The Virginia High Sch. League*, 581 F.2d 81, 83 (4th Cir. 1978) (parties stipulated to existence of state action).

scrutiny as a state actor and as being involved in state action."); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996) ("Preliminarily, everyone agrees that the actions of Section VI constitute state action....").

Further, the decision of the Sixth Circuit in this case conflicts with state supreme court decisions that have addressed the question. As Judge Merritt correctly observed, those courts "have held that their high school interscholastic athletic associations are state actors."[6] App. 4-C.

In addition, as Judge Merritt noted, "[t]his is an important case because all high school interscholastic athletic contests in the states of the Sixth Circuit and in almost all other states in the country are conducted in similar fashion by athletic associations like the TSSAA." App. 3-C. Because of the inconsistency of the decision of the Sixth Circuit with the "basic authorities on state action," and because the Sixth Circuit decision "created an unnecessary conflict in the circuits on an important question of constitutional law," Judge Merritt observed that the "conflict will have to be remedied now by the Supreme Court." App. 6-C. For these reasons, this Court should grant certiorari, or, if it believes that the authorities are overwhelmingly one-sided, exercise its authority to summarily reverse the state action decision of the Sixth Circuit.

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[6] See *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996); *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman*, 631 So. 2d 768, 773-74 (Miss. 1994); *Kleczak v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735-36 (R.I. 1992); *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 & n.4 (W. Va. 1989).

II. THIS CASE IS OF NATIONAL IMPORTANCE BECAUSE OF ITS POTENTIAL IMPACT ON SCHOOL CHOICE AND POTENTIAL ADVERSE EFFECT ON ACCOUNTABILITY IN GUARDING AGAINST RACE, SEX, AND RELIGIOUS DISCRIMINATION IN HIGH SCHOOL ATHLETICS

A. *School Choice*

TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to seek out students by informing them of educational opportunities. The rule also makes it more difficult for students and parents to learn about alternative educational options, including financial aid.

TSSAA's Recruiting Rule far transcends the athletic context because it applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an independent school is willing to avoid interscholastic athletics altogether or to ban students it recruits generally from interscholastic athletics, both the school and the potential students are compromised. This blow against school choice is struck on behalf of the state by public school officials who join together to form an association the Sixth Circuit deemed private, but that has regulatory authority over interscholastic athletics for the entire state. By implementing the various bans on student recruitment — and focusing on students with and without an athletic record — TSSAA is limiting opportunity, not guarding against "undue influence."

A concern with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in

athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The district court saw this point but the Sixth Circuit did not.

Properly understood, the role of public schools is to provide a service to students, affording them an opportunity for advancement. A risk is that the community and its public educators can get the sequence backwards, seeing students as objects for use by the state to achieve communal goals. Rather than focusing on the students and promoting their best interest, government and those acting on its behalf have sometimes taken steps deemed in the communal interest that are, unfortunately, at the expense of the educational opportunity of individual students. That treats students as creatures of the state — a means to a communal end.

Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), however, teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." *Meyer*, 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power...to standardize its children by forcing them to accept instruction from public teachers only." *Pierce*, 268 U.S. at 535.

In the current context, TSSAA, as agent of and on behalf of the state, has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state — placing more choices on the educational menu for students and their families — TSSAA has sought to circumscribe and even foreclose opportunities for many

youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

In this scenario, independent schools are misperceived as a threat to the community rather than an alternative opportunity for the community's students. Independent schools, it is feared, may lure students ("our students") away from public schools with an adverse impact on certain aspects of the public system (*e.g.*, the ability of public schools to field championship sports teams).

Instead of acting in the students' best interests by encouraging communication about opportunities for educational enrichment, TSSAA views students as a means to an end — a sports championship for a public school team. This, in effect, treats students as objects, as "mere creature[s] of the state," which *Pierce* forbids. *Id.* That approach turns the traditional role of government — facilitating educational opportunities for youth — on its head and disrespects the primacy of student and family choice in education.

Even though students have a constitutionally-protected interest in attending independent schools (*Pierce*), in participating in athletics as a subject of education in an independent school (*Meyer*), and in receiving information (*Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) about independent school opportunities, TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." App. 39-B. TSSAA's Recruiting Rule assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. And the state action decision of the Sixth Circuit allows public school officials to effectuate that objective without constitutional scrutiny.

This forms the essence of the district court's holding that TSSAA must be constitutionally accountable and "does not have a legitimate interest in preventing a school, public,

private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." App. 46-B. Indeed, the "State's interest...is the reverse. The State has a profound interest in students making informed choices about education." App. 46-B n.18. As the district court so clearly and cogently put it,

> it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side...by suppressing the speech of the other.... TSSAA cannot control school choice through censorship.

App. 46-B.

B. *Accountability*

Under the Sixth Circuit's decision, the regulatory conduct of a high school athletic association would not be subject to constitutional scrutiny. Claims of race, sex, or religious[7] discrimination would be constitutionally unreviewable. App. 5-C—6-C. This is particularly troublesome for three reasons.

First, TSSAA and comparable organizations have a track record that raises concerns about the lack of accountability. See, e.g., *infra* note 16 (retaliatory conduct); *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th

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[7] For example, TSSAA controls state interscholastic athletic championships. If it is not a state actor and is therefore not subject to constitutional scrutiny, how would that affect the analysis of a TSSAA-sponsored religious ceremony at the public high school state football championship? Cf. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir.), *cert. granted*, 68 U.S.L.W. 3325 (U.S. Nov. 15, 1999) (No. 99-62).

Cir. 1976) (refusal to allow girls to try out for boys' cross-country team when no girls' cross-country team exists); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968) (racial segregation); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.) (unreasonable refusal to waive rule adversely affecting student with disability), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 21, 1999).

Second, while aggrieved individuals in public schools have recourse against their public schools, claims of discrimination by private schools and their students will not be actionable under the decision of the Sixth Circuit. For example, in *St. Augustine*, *supra*, a private school alleged race segregation in the regulation of high school athletics by LHSAA. No constitutional recourse would exist if the decision of the Sixth Circuit stands. Further, even in the public school context, a suit against a public school is not a complete substitute for a claim against the association. Proof of intent is an essential element of a race or sex discrimination action. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979). It is not clear that purposeful discrimination by a "private" high school athletic association, acquiesced in innocently by a public school, would be imputed to that public school. Cf. *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998) (noting issue of whether school district was "ignorant of any discrimination" on part of nominally private interscholastic wrestling association).[8]

Third, in *NCAA v. Smith*, 119 S. Ct. 924 (1999), this Court held that NCAA was not subject to suit under Title IX because it was not a recipient of federal funds. Since Title IX

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[8] This was a concern in the peremptory challenge context, where discriminatory intent of a private litigant would not necessarily be transferred to the court itself. If the private party were not deemed a state actor, discrimination in the court system might have been constitutionally unreviewable if the court innocently enforced a discriminatory peremptory challenge. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991).

(relating to sex discrimination) is patterned on Title VI (relating to race discrimination), see *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), NCAA is not subject to scrutiny under either provision. *Smith* appears to apply to high school athletic associations, calling into question a number of circuit court Title IX decisions.[9] In light of *Smith*, associations such as TSSAA are likely not subject to scrutiny for race or sex discrimination under federal statutory law (Title VI or Title IX). Under the Sixth Circuit's decision, TSSAA is now also not subject to constitutional scrutiny. This Court should review a state action finding that is so far outside the national consensus and has such far-reaching consequences, essentially immunizing the conduct of TSSAA and like organizations from scrutiny or accountability under federal statutory (Title VI or Title IX) or constitutional law.

III. THE DECISION OF THE COURT OF APPEALS IS WRONG AND IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT

Two sets of functional relationships are important in understanding the state action status of high school athletic associations such as TSSAA. The first is the state-level relationship between TSSAA and the SBE, which is the state agency responsible for statewide governance of the system of public education. Petitioner describes this as the "top-down" state action perspective. The second set of relationships involves TSSAA, local officials who largely comprise the membership and who exclusively comprise the governance of the organization, and the local public schools responsible for providing public education in the state.

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[9] See, e.g., *Horner v. KHSAA*, 43 F.3d 265, 271-72 (6th Cir. 1994); *Yellow Springs Exempted Bd. of Educ. v. OHSAA*, 647 F.2d 651, 654-57 (6th Cir. 1981).

Petitioner describes this set of relationships as the "bottom-up" state action perspective.

The Sixth Circuit misperceived the nature of the top-down analysis under this Court's cases. See, e.g., *West v. Atkins*, 487 U.S. 42, 55-56 (1988). The Sixth Circuit ignored entirely the local-government-level relationships — the bottom-up analysis — thereby running afoul of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

The regulatory conduct of high school athletic associations is attributable to the state for two basic reasons, which track the top-down and bottom-up perspectives.

First, interscholastic athletics constitute an important part of a high school's program and a considerable part of its budget. Every state's constitution imposes a duty on the state to maintain a public school system. When the state explicitly or implicitly delegates a portion of that responsibility — the regulation and coordination of interscholastic athletics — to a separate entity, it cannot escape ultimate constitutional responsibility for the conduct of that entity. See *West*, 487 U.S. at 55-56 (where state has a duty to provide a service, it cannot deprive injured parties of constitutional recourse by delegating provision of the service to a private party); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 988 (1999) (reaffirming *West*'s delegation principle where state's "constitution or statutory scheme obligates the State to provide" services); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

Second, high school athletic associations are made up of local public officials (typically public school principals) who, acting collectively, regulate high school athletics and control policy-making and decision-making. An association that is largely composed of local public officials of a single state, that is exclusively governed by local public officials, and that exercises regulatory control over interscholastic athletics — an integral component of a state-mandated

obligation — cannot shed its public character by calling itself a voluntary organization. See *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988) (noting that the regulatory conduct of a high school athletic association would be fairly attributable to the state where the "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign").

A. *Interscholastic Athletics Are an Integral Component of Public Education*

"Extracurricular activities are an important component of an education in today's modern society." *Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449, 457 (W.D. Mo. 1980). This is hardly a recent insight as the ancient proverb *mens sana in corpore sano* ("a sound mind in a sound body") attests specifically regarding the relationship between athletics and education.

In a submission to the Sixth Circuit, Chester E. Finn, Jr. and Daniel Casse, nationally recognized education and public policy experts, asserted that "[e]xtracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds." App. 10-E. They noted the importance of motivation in the educational process, concluding that "like art, drama, and journalism," athletics "can provide the motivation to learn," serving as the "hook to get the attention of students and rivet it on the core curricular mission of the schools." App. 11-E. While athletes may stay in school because of their interest in sports, "learning and the pursuit of knowledge can be infectious." *Id.*

SBE has recognized that "[c]ompetitive athletics is a big part of the high school experience.... TSSAA manages these activities as sanctioned by the [SBE]." App. 25-B — 26-B. Under state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. Thus, students get academic credit for TSSAA-regulated activities. App. 34-B. The district

court concluded that "interscholastic athletics are intricately connected to the educational process" (App. 33-B) and that there is a "close identification" of TSSAA with the State's "provision of education." App. 36-B.

TSSAA acknowledges that athletics are an integral component of education. In a letter to petitioner, TSSAA's Executive Director stated: "High school athletics is [sic] a part of the total educational program." App. 33-B. In its Constitution, TSSAA recognizes that there is an integral relationship between athletics and other components of the total educational experience: "The athletic field and the gymnasium are classrooms" for "teaching...character, integrity, sportsmanship, and team work." *Id.* TSSAA "aims to co-ordinate [sic] the athletic and scholastic programs" of Tennessee's secondary schools, recognizing that the "physical" and "mental" components of education "complement" each other. *Id.*

Thus, TSSAA recognizes in its own Constitution the integral role that the "athletic program" has within the state's overall educational program. And that educational program falls within the jurisdiction of and is the responsibility of Tennessee's public high schools and their principals, who comprise the membership and governance cadre of TSSAA.

B. The Bottom-Up Perspective: The Decision of the Court of Appeals Is Inconsistent With Decisions of This Court

From the "bottom-up" perspective, state action analysis focuses on the composition of TSSAA's membership, its governance structure, and TSSAA's relationships with local public schools. TSSAA is a joint venture by local public officials and public entities to establish and implement rules regarding the public officials' official duties and the public entities' public responsibility. It was quite inaccurate for the Sixth Circuit to view these high school athletic associations as private — like a coaches' association, teachers' union, or book club.

TSSAA is organized, controlled and governed by public officials and entities and exercises regulatory authority over an important component of Tennessee's educational system — interscholastic athletics. TSSAA is not a private organization structured by private parties unrelated to the state or local governments. It is not a privately owned and operated institution that sells services to the state. Nor is it a private company with a private board and a nongovernmental character whose relationship with government is limited to a commercial interaction such as the sale of services.[10]

Rather, TSSAA is primarily composed of and is exclusively governed by public entities and public officials whose single mission is the regulation of interscholastic athletics. TSSAA's member schools and the local public officials in charge of the governance of the organization are the source of authority with control over the development and implementation of TSSAA rules, policies and regulations. The regulatory conduct of TSSAA, as reflected in the adoption and enforcement of the Recruiting Rule, cannot be disassociated from the control of TSSAA by local public officials and public entities.[11] Public officials and entities, themselves state actors, do not lose their public character when they act in concert to regulate and supervise an integral component of the educational process (interscholastic athletics) otherwise within their jurisdiction as public actors (public high school principals). Based on its mission, composition, and governance structure, TSSAA's regulatory conduct cannot plausibly be characterized as "independent of any particular state." *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988).

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[10] Contrast *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (privately owned nursing home with state Medicaid contract not a state actor).

[11] Tennessee law requires that "[t]here shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district." T.C.A. § 49-1-102(c). There is also a provision for a "local board of education" and a "superintendent or director." *Id.*

The Tarkanian Case. The bottom-up analysis, which was entirely disregarded by the Sixth Circuit, conforms to the analytical approach adopted by this Court in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which the district court found persuasive and controlling. App. 29-B—30-B. In his dissent, Judge Merritt concluded that the court of appeals' decision "appears to be inconsistent with" *Tarkanian* footnote 13. App. 4-C. Without exception, every other case that mentions footnote 13 has concluded that, under it, the regulatory conduct of a nominally private high school athletic association constitutes state action.[12]

In *Tarkanian*, this Court held that NCAA, a *national* organization, did not act under color of *state* law when it made and enforced its rules and regulations governing intercollegiate athletics. The University of Nevada, Las Vegas (UNLV), which employed Coach Tarkanian, was a member of NCAA, "participated in promulgating [NCAA's] rules," and, therefore, presumably "had some impact on the NCAA's policy determinations." *Tarkanian*, 488 U.S. at 193. But UNLV was only one of "NCAA's several hundred other public and private member institutions," and each of those other institutions (located outside the state of Nevada) "similarly affected those policies." *Id.* Those non-Nevada institutions "did not act under color of Nevada law." *Id.*

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[12] See *Brewer v. Purvis*, 816 F. Supp. 1560, 1574-75 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir.) (holding that "an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor"), *and cert. denied*, 514 U.S. 1111 (1995); *Libby v. The South Inter-Conference Ass'n*, 728 F. Supp. 504, 506-07 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990) (same); *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting from holding but agreeing that *Tarkanian* footnote 13 requires a finding of state action); *Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp. 2d 1189, 1192-93 (D. Ore. 1999); *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998); *Jordan v. Indiana High Sch. Athletic Ass'n*, 813 F. Supp. 1372, 1377 (N.D. Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994); *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Indiana High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540, 547-50 (Ind. Ct. App. 1992).

Therefore, NCAA's promulgation and enforcement of rules and regulations could not fairly be attributable to Nevada.

NCAA's member institutions, "the vast majority of which were located in States other than Nevada," were the true "source" of the rules and regulations adopted by NCAA, and the organization influenced by those member institutions (NCAA) was "independent of any particular state." *Id.* The state of Nevada, through UNLV, had only a "minor role in the formulation" of NCAA's rules and regulations and in their implementation. Therefore, the conduct of NCAA could not fairly be attributed to the State of Nevada. *Id.* at 195.

Thus, in *Tarkanian*, NCAA was not a state actor because Nevada had only a "minor role in the formation" and implementation of NCAA rules and regulations; neither Nevada itself nor Nevada public officials or institutions exercised control over the governance of NCAA. *Id.* The "collective membership" of NCAA controlled and was the true "source" of its policies, and that collective membership was "independent of any particular state." *Id.* at 193.

In a critical footnote, this Court explained that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at n.13. Within a single-state athletic association, the members that comprise the association do not have only a "minor role in the formulation" and implementation of association policy. *Id.* at 195. The "collective membership," who in fact constitute the true "source" of the associations' policies, are not "independent of any particular state." *Id.* at 193. Rather, they are largely public schools and public school officials from within an individual state who run those organizations. Instead of having a "minor role" in the governance of these secondary school athletic associations, these local-level public officials control these associations. Indeed, these associations are a vehicle through which "public institutions created by the same sovereign," *id.* at n.13, act "collective[ly]" and constitute the true "source" of the policies adopted and

implemented by the associations. *Id.* at 193. For that reason, as this Court stated in *Tarkanian*, the regulatory conduct of these secondary school associations is "fairly attributable" to the state in which they are located. This Court expressly cited approvingly two circuit court decisions in support of its conclusion. See *id.* at n.13 (citing *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) (finding state action in suit by private black high school alleging race discrimination), and *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (finding state action in claim of gender discrimination)).

As the district court held, TSSAA falls within *Tarkanian* footnote 13 since its "collective membership" consists of public institutions (public schools) and public officials (high school principals) from within Tennessee. TSSAA's membership includes virtually every public high school in the state. TSSAA's governance is controlled by the Legislative Council and the Board of Control, both of which are composed exclusively of the principals of public schools. These are public officials, and they control the TSSAA decision-making process. Holding their positions in TSSAA by virtue of their official offices as public school principals, these public officials have "direct control over the development and implementation of TSSAA rules and regulations." *Graham v. TSSAA*, 1995 U.S. Dist. LEXIS 3211, at *15-16 (E.D. Tenn. 1995), *appeal dismissed as moot*, 107 F.3d 870 (6th Cir. 1997); accord *Crocker v. TSSAA*, 735 F. Supp. 753, 759 (M.D. Tenn.), *appeal dismissed as moot*, 908 F.2d 972 (6th Cir. 1990).

The Sixth Circuit declined to apply *Tarkanian* footnote 13 because of petitioner's status as a private school and because footnote 13 noted that, under the *Tarkanian* dissent's theory, NCAA would not act under color of law when regulating private universities. No other court has deemed this distinction analytically significant in the context of a high school athletic association, and it has no force as footnote 13 cited approvingly the *St. Augustine* case, a

private school challenge to the conduct of LHSAA. See *supra* note 3.

Analysis of the dissent in *Tarkanian* is necessary to demonstrate that the Sixth Circuit's distinction does not withstand scrutiny. The *Tarkanian* dissent would have found state action because of the relationship between NCAA and UNLV, a public university, when "UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian." *Tarkanian*, 488 U.S. at 197 n.17. The dissent viewed the case as one of "joint participation" between NCAA (a private entity under this analysis) and UNLV, a public institution — not in the formulation but in the implementation of an NCAA rule. *Id.* at 200 (White, J., dissenting). The dissent would have attributed NCAA's conduct to Nevada because of NCAA's interrelationship with UNLV, a public university, at the enforcement stage. Clearly, that joint participation theory would not apply where the final implementation of an NCAA sanction is carried out by a private university. *Id.* at 202 n.2.

This case involves a challenge to the formulation of TSSAA's Recruiting Rule and to its enforcement directly by TSSAA against petitioner. The joint participation in this case involves TSSAA and the public officials who comprise its membership and governance cadre in the formulation and TSSAA's direct enforcement of the Recruiting Rule. It is that joint participation in the formulation and direct enforcement of the Recruiting Rule that dictates a finding of state action status for TSSAA. TSSAA's regulatory conduct is state action because TSSAA's "collective membership," which is the "source" of its regulatory authority, is composed primarily of public school officials and governed exclusively by those public officials.

For the *Tarkanian* dissent, NCAA had private status until it acted jointly with a public institution in the implementation of NCAA-driven sanctions. At that point NCAA's conduct, under the *Tarkanian* dissent's theory, became attributable to the state. In contrast, TSSAA acted under color of state law when it formulated and directly

enforced the Recruiting Rule because of the nature of its composition and governance. The public or private status of the institution being regulated is analytically irrelevant for determining TSSAA's state action status under *Tarkanian* footnote 13.

The West Case. As Judge Merritt concluded, the Sixth Circuit's decision "seems clearly inconsistent with the theory of state action set out in *West v. Atkins*, 487 U.S. 42, 55-56 (1988)." App. 5-C. *West* requires a "functional" analysis of the activity of the private individual or agency in question to determine the degree of "cooperation" between state and local officials and the actor and an analysis of the degree of "coercion" exercised by the actor over persons under the control of a state or local governmental institution. *Id.*; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991) (setting forth functional elements in state action analysis).

According to Judge Merritt, the Sixth Circuit "made no effort to analyze the cooperative relationship between TSSAA and the state's public high schools or the coercive power of TSSAA." App. 5-C. He noted that "TSSAA establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee." *Id.* With the TSSAA board "consist[ing] entirely of public school officials,"[13] TSSAA is the government's "agent for

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[13] The public schools' educational programs cannot be separated from their athletic programs. Control over time for interscholastic sports rests with public school authorities. See T.C.A. § 49-6-1002(a). The schools pay the salaries of and hire and fire the coaches. See, e.g., *White v. Banks*, 614 S.W.2d 331, 332 (Tenn. 1981); *Warren v. Polk County Bd. of Educ.*, 613 S.W.2d 222 (Tenn. 1981). "For a school to be a member of TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education and must be paid entirely from funds approved by the Board of Education or the governing board of the school." App. 33-B.

controlling an important, highly visible[14] component of its statewide educational program — inter-school athletics." *Id.*

C. The Top-Down Perspective: The Sixth Circuit's Decision Is Inconsistent With Decisions of This Court Because, In Evaluating the Relationship Between TSSAA and the Public System, the Sixth Circuit Inappropriately Relied on a Formal Rather Than a Functional Analysis

A private party may act under color of state law because government has delegated an affirmative governmental obligation to that private party. See *Tarkanian*, 488 U.S. at 195 ("It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor."). As is the case in all states, Tennessee is obliged under its Constitution to "provide for the maintenance, support and eligibility standards of a system of free public schools." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 151, 156 (Tenn. 1993). Responsibility for designing and maintaining a "free public school system rest[s] on the [state]," *id.* at 151, and is a "duty specifically imposed" on the state. *Id.* at 156.

In this case, the state[15] has delegated its authority over the regulation of an important component of public secondary education to TSSAA, which claims private status. But a state may not, contractually or otherwise, absolve itself of constitutional accountability by delegating to a nominally private entity a responsibility for which the state has an affirmative duty (such as providing and regulating education). In such circumstances, a nominally private party makes decisions as a government proxy. Government cannot

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[14] Public school teams play on public school fields, in school uniforms, and with cheerleading squads bearing official school insignia. Public schools transport students to interscholastic events in school buses bearing the markings of the public school or the school district.

[15] The "state" includes local school districts, which have delegated their responsibility to supervise and coordinate interscholastic athletics.

avoid constitutional accountability by delegating its duty to private entities. Those harmed by the regulatory conduct of the delegatee cannot be deprived of their "means to vindicate" their constitutional rights. *West*, 487 U.S. at 56. Otherwise, the state would be "free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." *Id.* at n.14. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 987 (1999) (private utilization review organization, delegated authority by state to determine whether treatment provided under a workers compensation program is medically appropriate, "may properly be considered a state actor"). Under the circumstances, the regulatory conduct of TSSAA, which has the power to sanction public[16] and private schools alike, is "fairly attributable" to the state.

Nominally private conduct can become "so entwined with governmental policies or so impregnated with a governmental character" as to become fairly attributable to the state. *Evans v. Newton*, 382 U.S. 296, 299 (1966). Government's identification with certain conduct can make the government a "joint participant" with private actors, thereby resulting in the ostensibly private actors being considered to operate under the color of law. See *Burton v.*

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[16] For example, TSSAA has ordered that a Nashville public high school forfeit all games in which a student participated in violation of a TSSAA rule. In that case, a federal court ordered the school to admit the student and to allow him to play interscholastic athletics. A student with a disability who transferred schools to receive a free appropriate public education to which he was entitled under federal law could not be barred from participating in interscholastic athletics, despite TSSAA's transfer rule and TSSAA's unwillingness to waive that rule. When the district court's injunction was vacated on procedural grounds, TSSAA ordered the school to forfeit all games in which the student had played, "as well as all championships and trophies, which resulted from those games." *Crocker v. TSSAA*, 735 F. Supp. 753, 756 (M.D. Tenn.). The court barred that forfeiture on the ground that TSSAA could not penalize the public high school for obeying a federal court order. *Id.* at 760-61.

Wilmington Parking Auth., 365 U.S. 715, 725 (1961). Where the state is identified with private conduct, it may not effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them.

The "functions of the TSSAA are so closely identified with state activities that the association is [a state actor]." *Kelley v. Metropolitan Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968) (adjudicating claim of race discrimination against TSSAA). Instead of focusing on the functional relationship between TSSAA and the system of public education, as required by decisions of this Court, the court of appeals relied on an empty formalism in rejecting state actor status for TSSAA.

For twenty-four years Tennessee explicitly delegated regulatory and administrative authority over interscholastic athletics to TSSAA,[17] but in 1995 revoked its designation of TSSAA "apparently in response to" cases finding TSSAA to be a state actor and "apparently to avoid a litigation claim of state action." App. 27-B. The revocation was a hollow formalism. As the district court found,

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.... A mere change in the words of the regulation...did not change the actual conduct of the TSSAA,

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[17] Representatives of the State Department of Education and of SBE are members of TSSAA and regularly attend meetings. App. 34-B — 35-B. TSSAA employees, including Respondent Carter, are covered by the state's retirement system and, by statute, are included in the definition of "teachers" for that purpose. App. 33-B. Cf. *St. Augustine High Sch.*, 396 F.2d at 227 (noting that the "paid staff of LHSAA is covered...by the Louisiana Teachers Retirement Act and staff members are legally defined as teachers").

> which constitutes state action. To hold otherwise would raise form over substance.

App. 26-B — 27-B.

Nevertheless, the Sixth Circuit relied solely on this empty formalism, which it deemed "fundamental" and which "dictate[d] the outcome of the present case." App. 16-A. No discussion or analysis of the actual functional effect as opposed to the formalistic conduct was engaged in or apparently deemed relevant, despite the many cases of this Court that require such a functional analysis.[18] See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991) (consideration of whether an "actor is performing a traditional governmental function" an important factor in determining state actor status); *West v. Atkins*, 487 U.S. 42, 55-56 (1988) (state actor status of private physician who provided medical care by contract in state prison was determined by his "function[s] within the state system, not the precise terms of his employment," by examining the nature of the "relationship among the State, the physician, and the prisoner," not just the formal terms of the contract); *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (though employed by the state, public defender is not a state actor because of the "nature of his function" within the adversarial criminal justice system); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974) (holding that the Fourteenth Amendment's "proscription on state action applies de facto as well as de jure"); *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (public nature of racially segregated park, originally

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[18] Petitioner has never relied on a "public function" theory of state action in this litigation and does not press that theory in this petition. A public function analysis requires that the activity in question be an "exclusive" public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). In contrast, the functional relationships involved in this case — both bottom-up and top-down — need not have been exclusively performed by government. Compare *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-28 (1991) with *id.* at 639-40 (O'Connor, J., dissenting).

devised to City of Macon as trustee and which had been an "integral part" of the city's activities, could not be "dissipated ipso facto by the appointment of 'private' trustees," where there was no clear and demonstrable change in the substantive relationship of the city to the park; private trustees' conduct was state action).

Judge Merritt's dissent properly decried the failure of the Sixth Circuit to engage in a "'functional' analysis of the activity of the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor and an analysis of the degree of 'coercion' exercised by the actor over persons under the control of a state or local governmental institution." App. 5-C.

For years, as a result of formally delegated authority, TSSAA has run a critical component of Tennessee's public education program. There continues in fact to be "entwined...management or control," *Evans,* 382 U.S. at 301, between the state and TSSAA, as well as substantial ongoing effects of years of actual and perceived interrelatedness, as no substantial alteration of preexisting policies has taken place. From the top-down perspective, therefore, the structural relationship between TSSAA and SBE and the function performed by TSSAA result in state actor status for TSSAA. As the district court concluded, SBE's formal resolution regarding TSSAA in 1995 does not magically shift TSSAA from state actor to private status.

The Sixth Circuit neither analyzed nor considered these functional realities, focusing exclusively on the revocation of explicit delegation. That formalistic analysis is entirely incompatible with the Supreme Court's analytical approach to these issues and warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6113

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment in favor of plaintiff Brentwood Academy is REVERSED, the injunction is

VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0225P (6th Cir.)
File Name: 99a0025p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

No. 98-6113

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 97-01249---Todd J. Campbell, District Judge.

Argued: April 23, 1999

Decided and Filed: June 21, 1999

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Charles Hampton White, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellants, James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Charles Hampton White, Richard L. Colbert, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, Tennessee, H. Lee Barfield, II, William Scott Sims, Bass, Berry & Sims, Nashville, Tennessee, G. Thomas Nebel, Nashville, Tennessee, for Appellee. John J. Kitchin, Kansas City, Missouri, Edmund J. Sikorski, Jr., Ann Arbor, Michigan, Steven L. Craig, HEICHECL, CRAIG & PRELAC, Canton, Ohio, Mallory V. Mayse, Colombus, Missouri, Danny C. Reeves, GREENEBAUM, DOLL & McDONALD, Lexington, Kentucky, Leonard E. Ireland, Jr., CLAYTON, JOHNSTON, QUINCEY, IRELAND, FELDER, GADD, ROUNDTREE, Gainesville, Florida, Terrence E. Kiwala, ROOKS, PITTS & PULST, Chicago, Illinois, for Amici Curiae.

OPINION

RONALD LEE GILMAN, Circuit Judge. This appeal involves the constitutionality of the Tennessee Secondary School Athletic Association's "recruiting rule." The rule prohibits member schools from "[t]he use of undue influence . . . to secure or retain a student for athletic purposes . . . ." Brentwood Academy, a private school and a member of the Tennessee Secondary School Athletic Association ("TSSAA"), was found to have violated the rule on two separate occasions. After exhausting its internal appeals of TSSAA-imposed sanctions, Brentwood brought the present lawsuit to allege

violations of its First and Fourteenth Amendment rights, as well as a host of other claims.

The district court granted summary judgment in favor of Brentwood on its claim that the recruiting rule violates the First Amendment, and enjoined TSSAA from enforcing the rule. TSSAA brings this interlocutory appeal, claiming that the district court erred in determining that TSSAA is a state actor, and further arguing that even if it is a state actor, that the recruiting rule is not violative of the First Amendment. For the reasons set forth below, we **REVERSE** the judgment of the district court, **VACATE** the injunction, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Brentwood Academy, a private Christian school located in Brentwood, Tennessee, is by all accounts something of a high school football powerhouse. The football team has been nationally ranked by *USA Today*, has amassed a 310-43 record over the past 28 years (as of March, 1998), and has won at least 7 TSSAA state championships. Brentwood's basketball team is also well known in athletic circles.

In 1997, various rival high school coaches alleged that Brentwood had violated TSSAA rules in a number of respects. TSSAA conducted an investigation, which focused on three specific incidents. The first incident occurred when Brentwood's football coach provided free tickets to a Brentwood football game for a middle school coach and two student athletes. The second claim also involved the football coach, who sent a letter to all incoming ninth-graders accepted at Brentwood that invited them to join the football team for spring practice while they were still in the eighth grade. The final incident involved the basketball coach conducting an

impermissible off-season practice for Brentwood's current players. Because the off-season practice by the basketball coach allegedly violated the aptly-named "off-season practice rule" rather than the "recruiting rule," it is not an issue in this case. The two actions involving the football coach, however, are based on alleged violations of the recruiting rule and are thus the focus of this appeal.

As set forth in TSSAA's regulations, the recruiting rule provides as follows:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or retain a student for athletic purposes shall be a violation of the recruiting rule.

TSSAA By-laws, Article II, Section 21. The regulations then contain approximately three pages of interpretation to assist member schools in understanding the types of "influence" that TSSAA considers "undue."

With cooperation from Brentwood, TSSAA completed its investigation in August of 1997. TSSAA concluded that all three incidents described above violated TSSAA rules. Brentwood was declared ineligible to participate in TSSAA tournaments in football and basketball for one year, and was placed on probation for two years. By the end of TSSAA's two-step internal appeals process, the penalties had actually increased, banning Brentwood from the tournaments for two years, placing the school on probation for four years, and fining the school $3,000.

Brentwood filed the present suit against TSSAA on December 12, 1997, seeking an injunction against the enforcement of the recruiting rule and alleging, among other state and federal claims, a violation of 42 U.S.C. § 1983. The § 1983 claim charged that TSSAA had deprived Brentwood of its First and Fourteenth Amendment rights under color of state law. Cross-motions for summary judgment were filed with respect to all claims except for Brentwood's allegations of antitrust violations. The district court granted summary judgment in favor of Brentwood on its First Amendment claims and enjoined enforcement of the recruiting rule. It granted summary judgment in favor of TSSAA on one state-law claim, and denied both motions on the remaining counts. TSSAA now appeals the district court's decision that TSSAA violated the First Amendment, arguing that it is not a "state actor," and that event if it is, its actions were valid under the First Amendment.

II. ANALYSIS

A. Standard of review

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenity Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial is presented

when there is sufficient "evidence on which the jury could reasonably find for the [non-moving party]." *Id.* at 252.

B. State action and TSSAA

To prevail on a First Amendment claim, the plaintiff must first make a showing that the defendant is a "state actor." "When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred 'under color of' state law; thus liability attaches only to those wrongdoers who carry a badge of authority of a State and represent it in some capacity . . . ." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). The Supreme Court has mandated careful adherence to the "state action" requirement because it "preserves an area of individual freedom by limiting the reach of federal law." *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936 (1982).

Analyzing the structure and function of TSSAA is therefore essential to the inquiry before us. Founded in 1925, TSSAA is a voluntary association incorporated under the laws of Tennessee. It is composed of 290 public schools and 55 private schools. TSSAA's constitution and bylaws specify that the administrative authority of TSSAA is vested in a Board of Control consisting of nine members elected by the member schools. Each Board member represents a particular region of Tennessee. The Board members are principals or superintendents of the member schools. At all times relevant to this action, the Board was comprised exclusively of public high school administrators, although private high school administrators are equally eligible for election to the board.

TSSAA receives no funding from the state, nor are the salaries of its staff paid by the state. Its revenues are derived primarily from gate receipts at TSSAA tournaments. TSSAA

schedules only the state tournaments, not the vast majority of interscholastic contests. Significantly, when it uses public facilities for these events, it must enter into a contract with the state to do so and pay for the privilege.

There is no authority anywhere in the Tennessee Code authorizing the state to conduct interscholastic athletics or to empower another entity to conduct such athletics on its behalf. Although a State Board of Education rule in effect from 1972 to 1995 "designated" TSSAA to conduct interscholastic athletics, that rule has since been repealed. The current rule states that public schools in Tennessee are authorized to join TSSAA, but are also authorized to withdraw from membership if they so choose.

These facts make clear that TSSAA is not an arm of the government. The more difficult question is whether we are required to treat it as such because it is so intertwined with the government that its actions should be considered as those of the state.

C. The *Blum* trilogy

The Supreme Court has devoted considerable attention to the question of what constitutes state action. In 1982, the Court decided three cases that defined the contours of the state action doctrine with respect to nominally private parties. *See Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982). These cases have collectively become known as the "*Blum* trilogy."

In *Blum*, the Court reviewed a challenge to a private nursing home's transfer and discharge policy. The nursing home was extensively regulated by the state of New York and received a

significant percentage of its funding from the federal government in the form of Medicaid reimbursement. In holding that the nursing home was not a state actor, the Court concluded that being subject to state regulation does not by itself convert the actions of a private organization into state action. *See id.* at 1004. The nursing home's use of government funds was also held insufficient to establish state action. *See Blum*, 457 U.S. at 1005.

In *Lugar*, Edmondson Oil had attached Lugar's property to satisfy an outstanding debt. Lugar sued, alleging that Edmondson Oil had acted jointly with the state to deprive him of his property without due process of law. The Court held that Lugar had to establish that the conduct allegedly causing the deprivation of a constitutional right was "fairly attributable" to the state. *See Lugar*, 457 U.S. at 937. In determining the question of fair attribution, the party charged with the deprivation must be a person who may be fairly said to be a state actor, either because he acted in his capacity as a state official, or because he has acted together with or has obtained significant aid from state officials. *See id.* The *Lugar* Court concluded that because the prejudgment attachment statute required judicial action to be enforced, there was sufficient government involvement to constitute state action.

Finally, in *Rendell-Baker*, the Supreme Court held that a school operated by a private corporation did not exercise state power when it discharged teachers (allegedly in violation of their First Amendment rights), even though the school had contracts with the state to pay for the education of most of the student body and most of its funding came from the government. *See Rendell-Baker*, 457 U.S. at 839-43.

D. Sixth Circuit Precedent

The *Blum* trilogy provides a framework for determining what conduct may be fairly attributable to the state. It does not set out a single test, because the Court has held that determinations of state action must be made on a case-by-case basis. *See Lugar*, 457 U.S. at 939. In attempting to enforce the mandate of the *Blum* trilogy, our circuit has applied three different tests. These are (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship test. *See Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (holding that a private, non-profit corporation that contracted to provide mental health services to a county government in Ohio was not a state actor). The focus of all three tests is to determine whether the alleged state actor's actions are "fairly attributable to the state." *Id.*

1. The public function test

The public function test asks whether "the private entity exercise[s] powers which are traditionally exclusively reserved to the state, such as holding elections, or eminent domain." *Wolotsky*, 960 F.2d at 1335 (internal citations omitted). Clearly the conduct of interscholastic sports is not such a power. The Supreme Court stated in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545 (1987), that "[n]either the conduct nor the coordination of amateur sports has been a traditional government function." We also note that all of the circuits that have considered the issue, including our own, have held that there is no constitutional right to participate in interscholastic sports. *See Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985); *Niles v. Texas Univ. Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983); *Herbert v. Ventetuolo*, 638 F.2d (1st Cir. 1981); *Moreland v. Pennsylvania Interscholastic Athletic Ass'n*, 572

F.2d 121 (3d Cir. 1978); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976). In light of these precedents, TSSAA cannot be considered a state actor under the public function test.

2. State compulsion

The state compulsion test requires that the party seeking to establish state action prove that the state has so coerced or encouraged a private entity to act that the choice of that entity must be regarded as the choice of the state. *See Wolotsky*, 960 F.2d at 1335. As detailed in Part II.B. above, the state of Tennessee's interaction with TSSAA has been minimal. The state's most significant involvement with TSSAA was the now-repealed Board of Education rule "designating" TSSAA to conduct interscholastic activities. The Supreme Court has made clear, however, that designation alone is not enough to turn a private actor into a state actor. In *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), a customer whose power was turned off for non-payment argued that he was entitled to a hearing under the Due Process Clause of the Fourteenth Amendment. The Court held that even though Pennsylvania had granted the power company a monopoly and the public utility board had explicitly authorized the regulations in question, there was no state action because the state had not directed or ordered that the customer's power be terminated. *See id.* at 358.

The state of Tennessee has far less contact with TSSAA than Pennsylvania had with Metropolitan Edison. The Pennsylvania legislature granted Metropolitan Edison a monopoly, heavily regulated it, and had a state oversight board that actually approved the power shut-off regulations. In the present case, the Tennessee legislature has never even mentioned TSSAA, much less given it any special authority. As a result,

Brentwood has failed to establish that TSSAA is a state actor under the state compulsion test.

3. Symbiotic relationship

The remaining and therefore dispositive question is whether TSSAA is a state actor under the "symbiotic relationship" test. *See Wolotsky*, 960 F.2d at 1335. A symbiotic relationship exists when there is "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* In *Crowder v. Conlon*, 740 F.2d 447, 450-51 (6th Cir. 1984), this court held that neither extensive state regulation nor state funding of a private entity are sufficient to support a finding of a symbiotic relationship. Instead, a "State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 450 (quoting *Blum*, 457 U.S. at 1004.)

a. Burrows

Burrows v. Ohio High School Athletic Association, 891 F.2d 122 (6th Cir. 1989), is instructive in this regard. In *Burrows* this court considered a challenge to an Ohio High School Athletic Association (OHSAA) rule that deprived students of one year of interscholastic eligibility if they participated in soccer leagues outside of the school system. After reviewing the structure and functions of OHSAA, the *Burrows* court concluded that it was not a state actor. *Burrows* held that in order to prove that a high school athletic association is acting under color of state law, a plaintiff has the burden of proving that the association's action was "caused, controlled or directed

by the state or its agencies." *Id.* at 125. This Brentwood has failed to do in the present case.

Because *Burrows* is the most recent pronouncement by our court on the question of whether a state high school athletic association is a state actor, we would under normal circumstances look no further in finding persuasive support for our conclusion that TSSAA is not a state actor. For reasons unknown, however, *Burrows* does not cite either of two earlier Sixth Circuit cases that discuss the state-actor status of OHSAA and reach the opposite conclusion. We are therefore obligated to consider each of these prior cases.

b. Yellow Springs

The earlier of the two uncited cases is *Yellow Springs v. Ohio High School Athletic Association*, 647 F.2d 651, 653 (6th Cir. 1981). Both the district court and Brentwood rely heavily on *Yellow Springs* to support their conclusion that TSSAA is a state actor. They reason that OHSAA and TSSAA are functionally indistinguishable, and that *Yellow Springs* is controlling because it precedes *Burrows*.

If they are correct, they *Yellow Springs* would necessarily bind us. We agree with Brentwood that when a later decision of this court conflicts with the holding of a prior decision, the earlier case should control. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 n.25 (11th Cir. 1998) (holding that, when faced with conflicting precedent, the earlier cases must control even if later cases are better reasoned). *See also Salmi v. Secretary of Health & Human Serv.*, 774 F.2d 685, 689 (6th Cir. 1985) (holding that a panel of this court cannot overrule the decision of another panel, and that the prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this

court sitting en banc overrules the prior decision.) The holding of *Yellow Springs*, however, is not in conflict with either *Burrows* or our present decision.

In *Yellow Springs*, a school district brought a Title IX challenge to an OHSAA rule that prohibited co-ed teams in contact sports. *See* 20 U.S.C. §§ 1681-88. In reciting the facts of the case, this court wrote that "OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state lead to the conclusion that the trial judge correctly found state action." *Yellow Springs*, 647 F.2d at 653. Brentwood argues that this statement is binding in the case before us. We disagree. *Yellow Springs* involved Title IX, a statute enacted to discourage sex discrimination in education regardless of whether the action was governmental or not. Unlike claims brought under the Fourteenth Amendment, private entities may be liable under Title IX without a showing of state action, as long as they are a recipient of federal funds. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) ("Title IX prohibits sex discrimination under any education program or activity receiving federal funds.") Because the *Yellow Springs* discussion of state action in the context of Title IX was superfluous, and the body of the *Yellow Springs* analysis concentrated on Title IX, the statements about state action are *dicta* and do not have the force of law.

c. Alerding

This brings us to *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985), the other relevant case not cited by *Burrows*. Brentwood argues that even if *Yellow Springs* is not controlling authority, we are still bound by *Alerding*. *Alerding* involved a challenge to an OHSAA rule that prohibited students who lived in other states from

participating in interscholastic athletics in Ohio. Student-athletes affected by the rule sued OHSAA pursuant to 42 U.S.C. § 1983, alleging an infringement of their rights under the Privileges and Immunities Clause of the Fourteenth Amendment. The entire body of the opinion is devoted to a discussion of the students' claims, which the court ultimately rejected.

Alerding's mention of the state action issue is relegated to a single footnote. It provides no analysis on this point whatsoever, and cites only one case, *Yellow Springs*, which dealt with the state action question in *dicta*. More importantly, the relevant footnote reads as follows:

> OHSAA is a state actor for purposes of § 1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic activities. [citing *Yellow Springs*].

Alerding, 779 F.2d at 316 n.1. Thus, Alerding's finding of state action was premised exclusively on Ohio's "implicit delegation." In contrast, Tennessee explicitly *revoked* its designation of TSSAA to regulate and organize interscholastic athletics when the State Board of Education's rule to that effect was repealed in 1995. Because we find this distinction fundamental, we conclude that *Alerding* does not dictate the outcome of the present case.

E. Tarkanian's footnote 13

Finally, we note that in finding state action, the district court relied on the fact that the Supreme Court indicated in *dicta* that a high school athletic association might potentially be a state actor. *See NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988) ("This situation would . . . be different if the membership

consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign.") In the very same footnote, however, the majority opinion notes that all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it "was not acting under color of state law in its relationships with private universities." As a result, we do not find that the Supreme Court's comments are controlling in the present case.

F. TSSAA not a state actor

Based on the above analysis, we conclude that (1) Brentwood has failed to establish that TSSAA's actions are fairly attributable to the state of Tennessee, and (2) we are not obligated to hold otherwise because of any prior binding precedent. As a result, no § 1983 claim may be brought against TSSAA by a member school that has voluntarily associated with the private organization. We therefore have no need to reach the merits of Brentwood's claims under the First Amendment. In so stating, we do not necessarily endorse the wisdom of the rule that TSSAA is attempting to enforce in this case. Brentwood has made strong arguments that the rule is vague and not well-tailored to the perceived evil sought to be avoided, which in turn may lead to arbitrary enforcement. Such complaints, however, are to be resolved among the membership of the TSSAA, not in the federal courts. We agree with the Fifth Circuit's statement that

> we are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, even parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude.

Hardy v. University Interscholastic League, 759 F.2d 1233, 1235 (5th Cir. 1985).

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district court's grant of summary judgment in favor of Brentwood, **VACATE** the injunction, and **REMAND** the case for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY	)	
	)	
V.	)	NO. 3:97-1249
	)	JUDGE CAMPBELL
	)	
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually	)	

ORDER

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998.

For the reasons described in the accompanying Memorandum, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part. Brentwood Academy's Motion is GRANTED as to its claim that TSSAA's Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the

TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part. Defendants' Motion is GRANTED as to Plaintiff's equitable estoppel claim and that claim is DISMISSED.

The disposition of other issues presented by the pending Motions is discussed in the Memorandum.

It is so ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRENTWOOD ACADEMY	)	
	)	
V.	)	NO. 3:97-1249
	)	JUDGE CAMPBELL
TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually	)	

MEMORANDUM

I. Introduction

Pending before the Court are Plaintiff Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) and Defendants' Motion for Summary Judgment (Docket No. 47). The Court heard oral argument on the pending Motions on July 16, 1998. For the reasons described herein, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part, and Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part.

Brentwood Academy sued the Tennessee Secondary Schools Athletic Association ("TSSAA") and its Executive Director, Ronnie Carter, alleging violation of Plaintiff's First

Amendment rights of free speech (Count I); violation of Plaintiff's Fourteenth Amendment substantive and procedural due process rights (Counts II and III); violation of federal antitrust laws (Count IV); equitable estoppel (Count V); and unfair, unreasonable, arbitrary and oppressive action in violation of state law (Count VI). Plaintiff seeks a permanent injunction barring the TSSAA from enforcing its "Recruiting Rule," as written and as applied to Plaintiff; money damages; attorneys' fees and costs. All the above claims, except the antitrust claims, are the subject of the pending motions.

II. Facts

Plaintiff Brentwood Academy is a co-educational, independent, college-preparatory school located in Brentwood, Williamson County, Tennessee. Combined Stipulations (Docket No. 24), ¶ 3. Brentwood Academy is a member of Defendant TSSAA, and the school's interscholastic athletic teams regularly participate in athletic contests regulated by the TSSAA. Id., ¶ 9.

Defendant TSSAA is a non-profit corporation organized and existing under the laws of the State of Tennessee, with its principal place of business in Hermitage, Davidson County, Tennessee. Id., ¶ 10.

Defendant Ronnie Carter is the Executive Director of the TSSAA and, at all times relevant to this action, acted as an employee and agent of the TSSAA and within the scope of his authority as an employee and agent. Id., ¶ 11.

The TSSAA is an association of public, independent and parochial secondary schools from across the state of Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools

compose 84% of the voting membership of the TSSAA, and independent and parochial schools compose 16% of the voting membership of the TSSAA. Id., ¶ 12.

The purpose of the TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Art. I, Section 2.

By electing to be a member of TSSAA, each member school agrees to abide by the Constitution and By-laws of TSSAA. Combined Stipulations, ¶ 44. The parties have stipulated the authenticity of the TSSAA Constitution and By-laws. Id., ¶¶ 17, 18.

The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body composed of high school principals or assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. Combined Stipulations, ¶ 14. The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. TSSAA Constitution, Art. III.

All the voting members of the Legislative Council and the Board of Control in 1997 were public high school administrators. None of the voting members of the Legislative Council and the Board of Control in 1997 were principals of independent or parochial schools. Combined Stipulations, ¶ 15.

The main question presented in this case is whether the following Recruiting Rule of the TSSAA violates the First Amendment or the Fourteenth Amendment to the United States Constitution:

Recruiting Rule

Section 21. The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

2.

Q. What is the penalty for violation of the recruiting rule?

A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school.

This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

1. Providing of transportation or other inducement to any prospective student/athlete to take a qualifying examination at a school, meet with school officials, etc.

2. Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school). All financial aid questions should be referred to the principal or the person in charge of financial aid. If the person in charge of financial aid is a coach, prior approval must be granted by the Executive Director of TSSAA.

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the

seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.

Private or parochial schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

6. A member school is prohibited from giving any item with school advertisement (shirts, pennants, caps, jackets, etc.).

7. Admitting students to athletic contests free of charge where there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

5.

Q. What is allowed by member schools in contacting prospective students?

A. A representative of the school may meet with students at a school that is defined as a feeder school or meet with students who are zoned to attend that school the following year. This visit must be cleared by the principals of both schools.

Guidelines For Understanding The "Recruiting Rule"
and
Understanding "What Is Undue Influence"

1. The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of many things that can exceed what is normal and appropriate.

2. One key is not treating "athletes" or "prospective athletes" any differently than students who are not athletes.

3. Students should be seen as students and not singled out based on their potential athletic ability.

4. Pre-arranged contact is seen in the same manner as initial contact.

5. Any student or family or individual that contacts a coach about attending a school where he or she coaches should be informed that they need to contact the principal, admissions department, or guidance department if they have an interest.

6. Any meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s)

responsible for admissions and should take place at the school.

7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in the same manner as college coaches view high school seniors.

8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

TSSAA By-laws, Art. II, Section 21. TSSAA's first version of the "recruiting rule" was adopted in 1935, and the rule in all its forms since 1935 has prohibited "the use of undue influence." Combined Stipulations, ¶ 54.

Since 1925, the State Board of Education has recognized the functions of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. See Docket No. 52 (Affidavit of Jerome V. Sailors), p. 2. In 1972, by rule, the State Board of Education designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08).

In addition, in 1972, the State Board approved the current rules and regulations of the TSSAA and reserved the

right to review the appropriateness of any future changes. Id. On several occasions between 1972 and 1992, the State Board reviewed and approved the TSSAA rules, including the Recruiting Rule at issue in this case. Docket No. 66 (Affidavit of Gary Nixon), attachment, pp. 24-25, 34, 38, 44, 52-53, 73-74, 76-78, 82, 88.

In 1995, the State Board of Education adopted an amendment to Rule 0520-1-2-.08, which deleted the former rule and replaced it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Tenn. Bd. of Educ. Rule 0520-1-2-.08 and Docket No. 66, attachment, p. 183.

In 1997, certain public high school coaches made allegations of recruiting violations by Brentwood Academy, and those allegations were subsequently communicated to the TSSAA. Combined Stipulations, ¶¶ 35-37. Based on the allegations, the TSSAA, through Defendant Carter, began an investigation. Id., ¶ 38. TSSAA made various claims, but only three allegations ultimately resulted in violations and penalties.

One claim involved the Brentwood Academy football coach, Carlton Flatt, allegedly providing free game tickets to a coach at a public middle school. The allegation was that Kevin Armstrong, a teacher and coach at Neely's Bend Middle School, used the free tickets for himself and two middle-school student-athletes, allegedly in violation of the Recruiting Rule. Complaint (Docket No. 1), Exs. A, D and G.

Another claim involved a Brentwood Academy basketball coach, John Patton, allegedly conducting impermissible off-season basketball practice with certain Brentwood Academy students in violation of the Off-Season Practice Rule. Id.

A third claim involved letters and telephone calls from the Brentwood Academy football coach, Carlton Flatt, to students from other schools who had contractually agreed to attend Brentwood Academy, to invite them to spring football practice at Brentwood Academy, allegedly in violation of the Recruiting Rule. Id.

In the spring of 1997, the father of an incoming ninth-grade student, who had already been accepted for admission to Brentwood Academy and had committed to attend in the fall, requested permission for his son to participate in Brentwood Academy's spring football practice. Affidavit of Carlton Flatt (Docket No. 30), ¶ 17; and Defendants' Local Rule Response ("Local Rule Response") (Docket No. 46), ¶ 77.

Brentwood Academy contends that in order to avoid an incorrect public perception and to avoid singling anyone out for special attention, the school sent a form letter (the "Spring Practice Letter") to all new incoming male students in grades nine and above, informing them of the dates for spring practice and inviting them to participate if interested. Flatt Affidavit, ¶ 19; and Local Rule Response, ¶ 80.

It is not a violation of the Recruiting Rule for incoming students to participate in school activities at Brentwood Academy, including spring football practice, prior to the time that they actually begin school at Brentwood Academy. See Docket No. 31, Ex. O (Carter Deposition), p. 39; and Local Rule Response, ¶ 75. The alleged violation of the Recruiting

Rule is the invitation to attend football practice, not the football practice itself.

The Spring Practice Letter was mailed on or about April 23, 1997, to all new incoming male students who had signed contracts to attend Brentwood Academy. Docket No. 31, Ex. Q (Brasher Deposition), p. 63; Local Rule Response, ¶ 81.

The full text of the Spring Practice Letter reads as follows:

> Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.
>
> Spring practice will begin May 1, 1997 and conclude and May 14, 1997. Practice begins at 3:30 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.
>
> In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an *Eagle*.
>
> Your Coach,
> /s/ Carlton Flatt

Docket No. 31, Ex. J; and Local Rule Response, ¶ 82.

Prior to receiving the Spring Practice Letter, each of the students and their parents had already made initial contact with Brentwood Academy to express interest in attending, applied for admission, visited the campus, taken the admissions test, been accepted by Brentwood Academy, and entered into a contract to attend the school. Flatt Affidavit, ¶ 20; and Local Rule Response, ¶ 83.

After receiving the Spring Practice Letter, a parent telephoned Coach Flatt to ask whether it was important for his son to attend spring practice at Brentwood Academy if it conflicted with an activity in which the student was involved at his middle school. Flatt Affidavit, ¶ 22; and Local Rule Response ¶ 85.

Although the Letter indicated that spring practice was optional, Coach Flatt believed, in light of that telephone call, that all of the students who received the Letters should again be contacted and informed that they should not participate in spring practice if it conflicted with activities at their respective middle schools. Flatt Affidavit, ¶ 23; and Local Rule Response, ¶ 86.

Coach Flatt chose to telephone the students because there was not enough time before the start of spring practice to send another letter. Flatt Affidavit, ¶ 24; and Local Rule Response, ¶ 87.

On July 29, 1997, Brentwood Academy was notified by letter from Defendant Carter that the TSSAA had found Brentwood Academy guilty of six violations of TSSAA Rules. Complaint (Docket No. 1), Ex. A. Specifically, as it relates to the issues before this Court, the TSSAA found that Brentwood Academy violated the Recruiting Rule through

the provision of free game tickets and the football Spring Practice Letter and telephone calls; and violated the Off-Season Practice Rule through the basketball practices mentioned above. Id.

As punishment for these violations, TSSAA imposed the following penalties: (1) Brentwood Academy would not be permitted any off-season practice in football or basketball for two years; (2) Brentwood Academy was placed on probation for two years and fined $3,000; (3) no Brentwood Academy athletic team would be permitted to enter the tournament series for 1997-98, and the football and boys' basketball teams would not be permitted to enter the playoffs and tournament series for 1998-99; and (4) the middle-school students who were given free game tickets were declared ineligible to participate in athletics at Brentwood Academy at any level. Id.

Brentwood Academy appealed this imposition of sanctions in compliance with a two-step appellate procedure set forth in Article VI of the TSSAA Constitution. Complaint, ¶ 82; Answer, ¶ 82. The first appeal was held on August 13, 1997, before Defendant Carter and an advisory committee comprised of three members of the TSSAA Board of Control. Id.; Local Rule Response, ¶ 92.

Defendant Carter was solely responsible for deciding the appeal. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 93. Although Defendant Carter was free to consult with the three board members who were present, he was not bound by their advice. Complaint, ¶ 83; Answer, ¶ 83; and Local Rule Response, ¶ 94.

As a result of this procedure, TSSAA changed the penalties as follows: (1) one of the four middle-school students was deemed eligible to participate in Brentwood

Academy sports at all levels; the three others were deemed eligible to participate at the junior varsity level only; (2) Brentwood Academy was placed on probation for four years, and the football and boys' basketball teams were denied the privilege of participating in the playoffs and tournament series for the 1997-98 and 1998-99 school years and forbidden from sharing in the tournament revenues or expense allotments for the 1999-2000 school year; (3) all other Brentwood Academy sports teams were allowed to participate in tournament series games, but they could not share in the tournament revenues or receive any expense allotments from the state tournament series; (4) Brentwood Academy was not permitted any off-season practice in football and basketball for two years; and (5) administrative personnel of Brentwood Academy were required to meet with Defendant Carter to review all policies and procedures in regard to the athletic program. August 14, 1997 letter from Defendant Carter to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. D.

Under TSSAA procedures, Brentwood Academy next appealed to the full Board of Control at a hearing held on August 23, 1997. Combined Stipulations, ¶ 42; Local Rule Response, ¶ 97. All of the voting board members who participated in the Brentwood Academy hearings are principals of public high schools; none are principals at independent or parochial schools. Combined Stipulations, ¶ 15; Local Rule Response, ¶ 99.

Defendant Carter was present during the Board of Control's deliberation process. Docket No. 31, Ex. O, p. 15; and Local Rule Response, ¶ 101. Defendant Carter answered questions from members of the Board of Control during the deliberation process. Docket No. 31, Ex. O, pp. 15-16; and Local Rule Response, ¶ 102.

The Board of Control found three violations of TSSAA rules: (1) student-athletes being admitted free of charge to athletic contests; (2) contact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools;[1] and (3) Brentwood Academy coaches conducting impermissible off-season practice with Brentwood Academy student-athletes. Letter of August 23, 1997, from Mike Reed to Bill Brown, Headmaster, Complaint (Docket No. 1), Ex. G.

The Board of Control ultimately imposed the following penalties on Brentwood Academy:

1. The entire athletic program of Brentwood Academy was put on probation for four years.

2. Brentwood Academy's football and boy's basketball programs were suspended from the TSSAA playoff series for the 1997-98 and 1998-99 school years.

3. Brentwood Academy was fined $3,000.

4. Brentwood Academy's football and boys' basketball programs were not permitted to engage in off-season practice in the 1997-98 and 1998-99 school years.

5. Appropriate administrative officials of Brentwood Academy were to meet with the TSSAA Executive Director to develop an administrative control plan to help guard against future problems.

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[1] TSSAA has stated that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls. Combined Stipulations, ¶ 40.

Complaint, ¶ 89; Answer, ¶ 89; and Local Rule Response, ¶ 103. These penalties were not itemized by type of violation in the final decision of the TSSAA against Brentwood Academy. Id.

Brentwood Academy filed this action on December 12, 1997. On June 1, 1998, Brentwood Academy moved for partial summary judgment and for a permanent injunction, contending that the Recruiting Rule violates Plaintiff's First Amendment free speech rights and Plaintiff's Fourteenth Amendment substantive due process rights and that Article VI of the TSSAA Constitution, as applied in the disciplinary proceeding herein, violates Plaintiff's Fourteenth Amendment procedural due process rights. See Docket No. 27. On June 30, 1998, Defendants moved for summary judgment, contending that they are entitled to judgment as a matter of law on Plaintiff's constitutional and state law claims. See Docket No. 47. The antitrust claim (Count IV) is not the subject of these dispositive motions.

Additional facts are discussed below as necessary.

III. Summary Judgment

As provided in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. Id. at 255, 106 S.Ct. at 2513-14, 91 L.Ed.2d at 216.

The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

The Supreme Court concluded in Anderson that a dispute about a material fact is "genuine" within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 252, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the non-moving party's position is required. Id. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." Davidson & Jones Dev. Co., Inc. v. Elmore Dev. Co., 921 F.2d 1343, 1349 (6th Cir. 1991). The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. Anderson, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; First Nat'l Bank of Arizona

v. Cities Serv. Co., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968).

IV. State Action

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 ("Section 1983") for alleged violation of Plaintiff's constitutional rights. Under Section 1983, a plaintiff must allege that he was deprived of a right secured by the U.S. Constitution or laws by a person acting under color of state law. 42 U.S.C. § 1983. Section 1983 erects no shield against merely private conduct, however discriminatory or wrongful. Mineo v. Transp. Mgmt. of Tenn., Inc., 694 F.Supp. 417, 423 (M.D. Tenn. 1988).

Thus, the initial question for the Court is whether the Defendants TSSAA and Carter are "state actors" subject to constitutional limitations under Section 1983. The Court finds that the TSSAA and Carter act under color of state law.[2]

The district courts in Tennessee have consistently held that the TSSAA acts under color of state law. In Kelly v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, 293 F.Supp. 485, 491 (M.D. Tenn. 1968), this Court held that TSSAA was subject to the constitutional limitations placed upon state action. Citing comparable cases in Louisiana and Oklahoma, Judge Miller noted:

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[2] The parties have stipulated that Defendant Carter is the Executive Director of TSSAA and, at all times relevant to this action, acted as an employee and agent of TSSAA and within the scope of his authority as an employee and agent. Combined Stipulations (Docket No. 24), ¶ 11.

> The TSSAA was organized for the primary purpose of performing a public function. Its stated objective is to "stimulate and regulate the athletic relations of the secondary schools of Tennessee." The vast majority of the schools belonging to the association are public schools constituting a part of the State's secondary school system.
>
> The Association's Board of Control and Legislative Council must be composed of school principals or superintendents. While the Executive Secretary of the association is not an employee of the State Board of Education, his salary and the other expenses of the association are paid from revenues primarily derived from games between member schools. Many of the games are played in state-owned buildings or on state-owned properties, and by the use of state-owned facilities.

Id. The factors cited in Kelly are also present in this case.

In another decision of this Court, Crocker v. Tennessee Secondary Schools Athletic Ass'n, 735 F.Supp. 753 (M.D. Tenn. 1990), aff'd, 908 F.2d 972 and 973 (Table) (6th Cir. 1990), Judge Nixon held that the TSSAA was a state actor for two reasons: (1) the State delegated to TSSAA its authority to regulate the eligibility of the public high school student to participate in interscholastic athletics and recognized TSSAA as the only organization to supervise and regulate athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis; and (2) the composition of TSSAA's membership and leadership demonstrates that it is a state actor. Id., p. 759. The delegation of authority referenced in Crocker was evidenced by a rule of the Tennessee State Board of Education. Crocker, 735 F.Supp. at 759 (citing

Tennessee Board of Education, Rules, Regulation and Minimum Standards, 0520-1-2-.26(l)).

In Graham v. Tennessee Secondary School Athletic Ass'n, 1995 WL 115890 (E.D. Tenn. 1995), appeal dismissed (mootness), 107 F.3d 870 (Table), 1997 WL 76958 (6th Cir. 1997), Judge Edgar found that the TSSAA was a "state actor" for purposes of Section 1983, under the "state compulsion test," set forth by the U.S. Supreme Court in Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). That test requires that the State must exercise some coercive power or provide such "significant encouragement," either overt or covert, that the choice of the private actor is deemed to be that of the state as a matter of law. Id., 457 U.S. at 1004, 102 S.Ct. at 2786.

Judge Edgar found that the TSSAA met this test for two reasons. First, noting that the State had delegated its authority to regulate eligibility of high school students to participate in interscholastic athletics to TSSAA,[3] the court held that the rules and regulations promulgated by TSSAA and their enforcement by TSSAA are "fairly attributable" to the State of Tennessee. Graham, p. *5. Second, the court found that the composition of TSSAA's membership demonstrates that it is acting under color of state law: "TSSAA includes among its membership every public high school in Tennessee. The Legislative Council and the Board of Control of TSSAA are composed of the principals of public schools. Thus, state employees, the public school principals, have some direct control over the development and implementation of TSSAA rules and regulations." Id., p. * 5. The court also noted that even though TSSAA argued

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[3] The court relied upon the same State Board of Education Rule cited in Crocker.

it did not receive any revenues directly from the State, it actually received the majority of its revenues from membership fees paid by public schools and from gate receipts at certain games between member schools, many of which are held in state-owned facilities. Id., p. * 6. These same factors are present in this case.

Defendants argue that Graham and Crocker do not apply because the State no longer "delegates" its authority to the TSSAA. Citing an amendment to the State Board of Education rule relied upon in those cases, Defendants argue that the State now merely authorizes the public schools to voluntarily maintain membership in the TSSAA. See Tennessee Board of Education, Rule 0520-1-2-.08.

A review of the history of the relationship between TSSAA and the State is informative. Since 1925, the State Board of Education has recognized the functions of the TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools in Tennessee. Affidavit of Jerome V. Sailors (Docket No. 52), p. 2. In 1972, the State Board of Education, by rule, designated the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). The authority granted expressly was to remain in effect until revoked. Id.[4] The TSSAA claims that authority was revoked in April of 1995, when the State Board of Education changed its rule. Even if that interpretation is true, however, for at least twenty-four

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[4] The State Board also determined that the Chairman of the State Board of Education "shall designate" a person or persons to serve in an ex-officio capacity on the TSSAA Board of Control and Legislative Council. Docket No. 52, p. 2.

years, the State expressly designated authority to TSSAA to regulate interscholastic athletics in the public schools.

Despite Defendants' bold statements to the contrary, clearly the State Board of Education has reviewed and approved rules and regulations of the TSSAA since at least 1972. The rule promulgated by the Board in 1972 stated: "The State Board of Education approves the current rules and regulations as stated in the Official Handbook of the Tennessee Secondary School Athletic Association and reserves the right to review the appropriateness of any future changes." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2-.08). Based upon Defendant Carter's "history" of the Recruiting Rule at issue in this case [see Docket No. 51 (Affidavit of Ronnie Carter)], it is apparent that the Recruiting Rule was included in the rules and regulations approved by the State Board.

In 1984, the TSSAA briefed the State Board of Education on TSSAA goals, purposes and procedures. See Docket No. 66 (Affidavit of Gary Nixon), attachment, p. 10. Subsequent minutes of the State Board of Education meeting of May 27, 1988, state:

> In 1984 the Board delegated to TSSAA the authority to promulgate rules relative to secondary school athletic events. That action called for a periodic review and approval of the operational authority delegated to TSSAA. The staff of the State Board of Education conducted the review and recommended that the TSSAA rules be approved and the TSSAA be designated to continue as the agency to govern secondary athletics for the Board.

Id., pp. 24-25.

On the agenda for the May 26, 1989 meeting of the State Board was the "annual review and report on Tennessee Secondary Schools Athletic Association Rules." Id., pp. 28, 30 and 34. On May 31, 1991, the Board approved the rules and regulations of the TSSAA, including the Recruiting Rule. Id., p. 38, 52-53. A memo from then-Executive Director Brent Poulton to Board members concerning that May 31, 1991 meeting states: "In effect, this amounts to reaffirmation of the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA." Id., p. 44.

The State Board of Education again approved the rules and regulations of the TSSAA, as late as its March 27, 1992 meeting, where the TSSAA appeared through its Associate Executive Director, Bob Baldridge, provided a report to the Board, and reviewed the current status of the TSSAA rules and regulations. Id., p. 88. Upon motion, the TSSAA rules were adopted and approved by the State Board of Education unanimously. Id., pp. 73-74, 76-78, 82, and 88. Again, the State approval included the Recruiting Rule.

In his memorandum to Board members concerning this March 27, 1992 meeting, then-Executive Director Poulton stated: "This is somewhat ceremonial, though important as a means of reminding the world that the TSSAA works as an agent on behalf of the State Board of Education." Id., p. 82 (emphasis added).[5]

In his memorandum to State Board members regarding their May 21, 1993 meeting, then-Executive Director Poulton stated: "Competitive athletics is a big part of the high school

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[5] The Court strongly disagrees that the vote of a state entity acknowledging that another body is its "agent" is "ceremonial." In any event, it is state action.

experience. The Tennessee Secondary Schools Athletic Association (TSSAA) manages these activities as sanctioned by the State Board of Education. This annual report keeps members informed of issues and changes in TSSAA policies." Id., p. 117.

It is disingenuous, at best, for Defendants to repeatedly state in their briefs, based upon testimony of Defendant Carter, TSSAA Executive Director, and Mr. Sailors, State Board of Education Executive Director, that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education.

In 1995, apparently in response to Crocker and Graham, the State Board of Education proposed and adopted an amendment to Rule 0520-1-2-.08 by deleting the existing rule and replacing it with the following: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." See Affidavit of Gary Nixon (Docket No. 66), attachment, pp. 134-37, 145, 148, 151-54, 162, 171, 173-74, 182-83.

Although the language of the rule was changed to no longer "designate" TSSAA as the official organization for supervision and regulation of secondary school athletics, it clearly singles out the TSSAA by name to serve this function. More importantly, the conduct of the parties has not materially changed. As indicated below, the connections between TSSAA and the State are still pervasive and entwined. Nothing about the function of TSSAA has

changed. Nothing about the realities of control over secondary school athletics has materially changed.

In short, the rule amendment had no material effect upon whether TSSAA is a "state actor" for purposes of Section 1983. The State of Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA, which constitutes state action. To hold otherwise would raise form over substance.

The decisions in both Crocker and Graham rely upon other factors besides the "delegation" argument.[6] In both decisions, the courts noted the composition of TSSAA's membership and leadership as a basis for state action. See Crocker, 735 F.Supp. at 759; Graham, 1995 WL 115890 at ** 5-6. Nothing about the composition and leadership of TSSAA has changed since Crocker and Graham.

It is undisputed that the overwhelming majority (84%) of the members of TSSAA are public schools. Combined Stipulations (Docket No. 24), ¶ 12. Members of TSSAA must be schools accredited by the State Board of Education. TSSAA Bylaws, Art. 1, Section 1.

TSSAA is governed by a Board of Control and a Legislative Council, elected by the members. TSSAA Constitution, Arts. III and IV. In 1997, all members of the

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[6] Defendants erroneously stated at oral argument that Graham was based solely on a "designation" theory.

Board of Control and the Legislative Council were principals of public schools. Combined Stipulations, ¶ 15. Thus, the membership of the TSSAA is primarily public schools and the governance of the TSSAA is exclusively by public officials. In addition, the TSSAA admits it is the only organization providing these benefits to the public secondary schools in Tennessee.[7]

The Sixth Circuit Court of Appeals addressed the issue of state action in interscholastic athletics in Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981), where it found that "[t]he OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state lead to the conclusion that the trial judge correctly found state action." Id., p. 653. The court cited many examples of the "symbiotic relationship" between the OHSAA and the state, including the OHSAA's organization of competitions, setting of schedules, arrangement of places to play tournament games, prescription of uniform rules of play, and power to sanction schools which violate those rules. Id. In addition, the court noted that to be a member of OHSAA, a school must be accredited by the State Board of Education and that membership in OHSAA is a virtual necessity, since the State Board does not provide any interscholastic athletic programs. Id. The same indications of a symbiotic relationship exist in this case.

After Yellow Springs, in Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), the Sixth Circuit held that the National Collegiate Athletic Association ("NCAA") was not a state actor. Specifically, the court held that the NCAA conduct was not traditionally and exclusively

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[7] TSSAA made this admission at oral argument.

the state's prerogative and that the state did not cause, control or direct the NCAA's action. Id., p. 958. The Court finds significant the fact that Graham involved the NCAA, a national athletic association, and not a state association.

The Supreme Court, in holding that a national athletic association (the NCAA) was not a "state actor," specifically noted: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 194, n. 13, 109 S.Ct. 454, 463, n. 13, 102 L.Ed.2d 469 (1988) (citing Clark v. Arizona Interscholastic Assn, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983) and Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968)).

This Court agrees with the analysis in Tarkanian. Thus, Defendants' reliance upon cases involving the NCAA is misplaced. In Brewer v. Purvis, 816 F.Supp. 1560, 1575 (M.D. Ga. 1993), aff'd, 44 F.3d 1008 (11th Cir. 1995), cert. denied, 514 U.S. 1111, 115 S.Ct. 1965, 131 L.Ed.2d 855 (1995), the court held that the Georgia High School Association and its employee were state actors for purposes of the Fourteenth Amendment, noting that "[t]raditionally, courts have found that high school athletic associations are state actors." The court distinguished Tarkanian because it involved the NCAA, specifically noting footnote 13 in that case, and stated: "Thus, an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor." Id. Also distinguishing Tarkanian on that same basis are Habetz v. Louisiana High School Athletic Ass'n, 915 F.2d 164, 166-67 (5th Cir. 1990) and Libby v. South Inter-Conference Ass'n, 728 F.Supp. 504 (N.D. Ill. 1990), aff'd., 921 F.2d 96 (7th Cir. 1990).

In 1989, the Sixth Circuit, relying exclusively upon Graham v. NCAA, held that the Ohio High School Athletic Association ("OHSAA") did not act under color of state law. Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir 1989). The Burrows court relied upon a case involving a national association, not a state association, and the opinion does not mention Tarkanian or Yellow Springs[8] at all. The Court finds that Burrows does not dictate the outcome of this case based on the facts presented here.[9]

In Clark and St. Augustine, the cases cited by the Supreme Court in Tarkanian, the courts listed numerous factors which indicated that the association's functions were "intertwined" with the state's actions: (1) composition of the association's membership primarily public schools; (2) public school principals — state officers, state paid and state supervised — comprise association leadership and play substantial role in determining and enforcing policies and regulations; (3) association funds come largely from public athletic events, the great majority of which are held at state-owned and state-supplied facilities; (4) paid staff of association covered by state retirement plan; (5) association exercises wide control over scheduling, participation in and

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[8] This omission is significant since the court had earlier held, in Yellow Springs, that the same athletic association (OHSAA) was a state actor. There is no explanation for the apparent conflict with the previous decision.

[9] In Graham v. TSSAA, Judge Edgar distinguished Burrows by citing the Tennessee Board of Education's greater involvement in the association's affairs. Graham, p. * 5. This Court agrees. See also Rhodes v. Ohio High School Athletic Ass'n, 939 F.Supp. 584, 590-91 (N.D. Ohio 1996), in which an Ohio district court, after Burrows, held that the OHSAA was a state actor, and Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994), also decided after Burrows.

conduct of athletic events of public schools; (6) association sets and enforces eligibility rules and limits numbers of games public schools may play; (7) association has power to keep public schools from competing against other schools; (8) association has power to investigate, discipline and punish member schools; and (9) rules and regulations of association bind all public schools, although any school may withdraw from association at any time. See Clark, 695 F.2d at 1128 and St. Augustine, 396 F.2d at 227-228.[10] Almost identical factors are present in this case.

The Court finds overwhelming evidence of the symbiotic relationship between TSSAA and the public, state-controlled school system in this case. For example, the stated purpose of TSSAA is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Section 2. TSSAA exercises wide control over scheduling, participation in and conduct of athletic events in public schools. TSSAA Bylaws, Arts. I, II, III and IV. TSSAA prescribes uniform rules of play. Id., Art. III, Section 8. TSSAA regulates the eligibility of public school students to participate in interscholastic athletics. Id., Art. II. TSSAA admits it is the only organization providing these benefits to the public schools of Tennessee.

Officials for athletic contests at TSSAA schools must be selected from the official TSSAA list and paid TSSAA-set fees. TSSAA Bylaws, Art. IV, and Docket No. 68, Exhibit A (June 11-12, 1997 TSSAA minutes). The TSSAA also

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[10] In Poret v. Louisiana High School Athletic Ass'n, 1996 WL 169241 (E.D. La. 1996), the court, noting the "new test" of Blum, found that, even under a "fairly attributable" standard, St. Augustine (cited above) is still controlling and the LHSAA is a state actor for purposes of Section 1983. Id., p. * 2 (citing Graham and Crocker).

sets the ticket prices for all regional and state tournament games. Id.

The TSSAA has the power to investigate and sanction schools which violate its rules. TSSAA Bylaws, Art. 1, Section 6. Thus, public schools, state agencies, are subject to TSSAA discipline. TSSAA can levy monetary fines against the public schools of Tennessee.

In addition, the TSSAA has the power to keep schools from competing against other schools. Id., Art. III. Its rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics.

TSSAA rules provide that public school principals and coaches submit certain reports to the association on a regular basis. TSSAA Bylaws, Arts. III and IV. In fact, the TSSAA Bylaws provide that principals — state-paid, state-supervised, public officials — are responsible to the association in all matters pertaining to athletic relations of their schools.[11] Id., Art. III, Section 8. State employees, therefore, are accountable to the TSSAA. Initial responsibility for assuring compliance with all TSSAA rules and regulations is placed in the hands of the principals. Id., Art. III, Section 9 and Art. IV, Section 8.

A substantial portion of TSSAA's annual revenue comes from tournament receipts from athletic tournaments of member schools. TSSAA Bylaws, Art. III, Section 17; Local Rule Response (Docket No. 46), ¶ 24. The majority of athletic contests between member schools are played in public, state-owned facilities. Id., ¶ 25. The TSSAA directly

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[11] Although unnecessary to the decision in this case, this regulation, on its face, raises conflict of interest concerns.

dictates the parameters of all post-season play for public schools. TSSAA Bylaws, Art. III.

Employees of TSSAA, including Defendant Carter, are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. Tenn. Code Ann. § 8-35-118; Local Rule Response, ¶ 21.

For a school to be member of TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education and must be paid entirely from funds approved by the Board of Education or the governing board of the school. TSSAA Bylaws, Art. III, Section 7.

TSSAA admits that interscholastic athletics are intricately connected to the educational process. For example, the Executive Director of TSSAA stated, in a letter to Plaintiff: "High school athletics is a part of the total educational program." See Ex. D to Docket No. 24. In addition, the first Article of the TSSAA Constitution provides:

> Recognizing that the primary objective of all secondary schools is to educate youth, the TSSAA aims to co-ordinate the athletic and scholastic programs. The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other.

TSSAA Constitution, Art. 1, Section 2.

By state law, participation in interscholastic athletics and marching band may be substituted for the physical education graduation requirement. Tenn. Bd. of Education Rule 0520-1-3-.06. Thus, students get academic credit for TSSAA activities, and the TSSAA is therefore performing part of a public function, required by state law, as the court in Kelly found.

On July 29, 1994, Defendant Carter, Executive Director of TSSAA, appeared at a State Board of Education meeting, on behalf of TSSAA, to answer questions about TSSAA's lack of minority hiring. See Docket No. 66, attachment, p. 111. The minutes reflect the State Board's "overall concern that TSSAA reflect hiring practices which are the same as those expected for local schools." Id., p. 112. At the September 29, 1994 meeting, Bob Baldridge, Associate Executive Director for TSSAA, appeared again to update the Board on TSSAA's employment practices. Id., p. 128. Thus, the State Board of Education injected itself into the TSSAA's hiring practices as late as 1994.

The TSSAA connection to the State Board of Education is further demonstrated by the fact that the TSSAA treated all Board members to dinner and helped with the expenses of the Board's July 1991 retreat. See Docket No. 66, attachment, pp. 63 and 69.

Mr. Sailors stated in his Affidavit that "no member of the State Board of Education attends meetings either of the TSSAA Board of Control or Legislative Council." Docket No. 52, p. 3. Yet minutes of the TSSAA Board of Control and Legislative Council meetings reveal that statement to be utterly false, since State Board representatives, including Mr. Sailors himself, attended more than twenty TSSAA Board of Control or Legislative Council meetings from 1990 through 1997. See Exhibit A to Docket No. 68.

The minutes of the June 8, 1990 Board of Control meeting reveal that the State Board of Education representative is, in fact, an ex-officio member of the Board of Control. Id.; see also Docket No. 52, p. 2. Therefore, TSSAA cannot argue that representatives of the State attended these meetings simply as members of the public. Those minutes state the following: "At the present time, there are three ex-officio members serving on the Board of Control and Legislative Council. They are representatives of the State Board of Education, the State Schools Boards Association, and the State Department of Education." Docket No. 68, Ex. A. So, not only is the State Board of Education represented on the TSSAA Board of Control and Legislative Council; the State Department of Education is represented within the governance of TSSAA as well. It is also significant that State representatives continued to attend TSSAA meetings as ex-officio members even after the "delegation" rule was changed in 1995. Docket No. 68, Ex. A.

Therefore, regardless of how the TSSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, "it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems" of the State of Tennessee. Haas v. South Bend Community School Corp., 289 N.E.2d 495, 498 (Ind. 1972) ("The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be 'state action' within the meaning of the Fourteenth Amendment.").

The supervision and regulation of interscholastic athletics in secondary schools in Tennessee is provided by the TSSAA, in joint participation with the State. Certainly the conduct of the TSSAA and the State meet the "significant encouragement" and "fairly attributable" tests of Blum.

As the court noted in Barnhorst v. Missouri State High School Activities Ass'n, 504 F.Supp. 449 (W.D. Mo. 1980):

> It is beyond cavil that education is a traditional function of the state. . . . Extracurricular activities are an important component of an education in today's modern society. The close identification of the functions served by MSHSAA with the State's provision of education to all children of school age (not otherwise receiving a private or parochial education) is a sufficient nexus to transmute the challenged rule of MSHSAA into "state action" subject to the constitutional strictures of the Fourteenth Amendment of the United States Constitution.

Id., p. 457.

The close identification of the TSSAA with the State's provision of education is a sufficient nexus to find state action in this case. Accordingly, the Court finds that the actions of the TSSAA, a state athletic association, are so intertwined with the State that they constitute "state action" for purposes of Section 1983. See also Clark, 695 F.2d at 1128; Dennin v. Connecticut Interscholastic Athletic Conf., Inc., 913 F.Supp. 663, 671 (D. Conn. 1996), judgment vacated on other grounds (mootness), 94 F.3d 96 (2d Cir. 1996); Force v. Pierce City R-VI School Dist., 570 F.Supp. 1020, 1030 (W.D. Mo. 1983); Beck v. Missouri State High School Activities Ass'n, 837 F.Supp. 998, 1001 (E.D. Mo.

1993), judgment vacated on other grounds (mootness), 18 F.3d 604 (8th Cir. 1994); Mississippi High School Activities Ass'n. Inc. v. Coleman, 631 So.2d 768, 774 (Miss. 1994).

V. First Amendment Freedom of Speech

A.

Brentwood Academy contends that the TSSAA Recruiting Rule violates its First Amendment right of freedom of speech. Plaintiff, in particular, emphasizes that by prohibiting school representatives from contacting a student before the student has attended the representative's school for three days, the Recruiting Rule violates the First Amendment on its face, and as applied in this case. Defendants contend that the Rule is a valid time, place and manner restriction. For the reasons described herein, the Court finds that the TSSAA Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy.

The Recruiting Rule appears at Article II, Section 21 of the TSSAA By-Laws, and consists of the "main" Rule, followed by five sets of questions and answers, and "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What is Undue Influence.'" The main Rule prohibits the use of "undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes."

In answer to Question 1, the phrase "undue influence" is defined as: "exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record." The phrase "appropriate or normal" is not defined in the Rule.

The answer to Question 3 following the Rule attempts to specifically regulate the conduct of coaches. It provides that a "coach may not contact a student or his or her parents prior to his enrollment in the school." The prohibition applies "whether or not [the student has] an athletic record."

"Contact" is not defined in the answer to Question 3, or anywhere else in the Rule. In that regard, paragraph six of the Guidelines provides that "[a]ny meeting with coaches regarding athletes or prospective athletes or their families should be at the request of the family to the individual(s) responsible for admissions and should take place at the school." It is not clear whether a member of the coaching staff may "contact" a student who has, at some time prior to enrollment, requested to speak with him or her. See Deposition of Robert Lee Baldridge, III, at 81-83 (attachment to Docket No. 80) (coach may talk with student if student has requested to talk with coach).[12]

"Enrolled" is also undefined in the answer to Question 3. The term is used again, however, in the second example in the answer to Question 4, which prohibits: "Discussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff until the student has enrolled in school (attended 3 days of school) . . ." The TSSAA has taken the position that this sentence clearly indicates that the term "enrollment," as it is used throughout the Rule and explanations, requires that the

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[12] Indeed, TSSAA Assistant Executive Director Robert Baldridge has testified that a member school does not violate the Rule by sending letters to, or calling, students who have made an "initial contact" with the school — a position contrary to the one taken by the TSSAA in penalizing Plaintiff for sending the Spring Practice Letter and calling students who had already signed enrollment contracts with the school. (Baldridge Deposition, at 83-84).

student have attended at least three days of school. (Defendants' Response To Motion For Partial Summary Judgment, at 95-96 (Docket No. 45)). Based on this interpretation by the TSSAA, the restriction under Question 3 prohibits a coach from "contacting" *any* student or parent until that student has attended the coach's school for three days.

Other explanations following the Rule specifically prohibit "initial contact or prearranged contact" by coaches or other representatives of the school with "prospective student/athletes." Specifically, three examples under Question 4 prohibit:

> 3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.
>
> 4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.
>
> Public high schools may contact public feeder schools (elementary, middle school, junior high school) where there is a definite feeder pattern. Private or parochial schools may contact private schools (elementary, middle school, junior high school) where there is a definite feeder pattern.
>
> Private or parochial schools may not contact students enrolled at the public schools. Public

schools may not contact students enrolled at the private schools.

5. Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite pattern.

"Feeder pattern" is not defined in the Rule, but the parties have stipulated that the Plaintiff has no schools in its feeder pattern. (Defendants' Local Rule 8(b)(7)(c) Response, ¶ 37(Docket No. 46)). [13] Based on these examples, any school representative, including a member of the coaching staff, is prohibited from making an "initial contact" with prospective student-athletes outside the "feeder" pattern for any reason until the student is enrolled at the school.

Plaintiff contends these restrictions on contact by schools violate the First Amendment.

B.

The principle underlying the Supreme Court's First Amendment jurisprudence is that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S.Ct. 2445, 2458, 129

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[13] Defendants suggest that the coach at Brentwood Academy can take advantage of the feeder school exception by talking with students who are in the first through sixth grade at the school. But Defendants have not suggested why they should be allowed to withdraw their stipulation. In any event, no reasonable person would interpret the term "feeder school" to mean the first six grades of the *same* school.

L.Ed.2d 497 (1994). Laws and regulations that "stifle [] speech on account of its message . . . pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." Id. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" Id. (quoting Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991)).

Laws that regulate the content of the message in this way are subjected to the "most exacting scrutiny." Turner Broadcasting, 114 S.Ct. at 2459. To judge those laws, the government must show that they serve a compelling interest, and are narrowly drawn. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987); First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). To be "narrowly drawn," the law must be the "least restrictive means" to further the government's articulated interest. Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

Defendants contend that the Recruiting Rule's prohibition on contact with prospective students is not an attempt to stifle speech, but is a valid time, place and manner restriction. In order to be analyzed as a time, place, and manner restriction, the regulation must be content-neutral. Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). If the regulation is content-neutral, it is subject to "intermediate" scrutiny: it must be narrowly tailored to serve a significant governmental interest, and it must leave open ample alternative channels

for communication of the information. Id. The means chosen need not be the least restrictive, but may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 109 S.Ct. at 2757-58.

In determining whether a regulation is content-neutral, the "government's purpose is the controlling consideration." Ward, 109 S.Ct. at 2754. A regulation that serves purposes unrelated to the content of the message is deemed content-neutral, even if it has an incidental effect on certain messages or speakers. Id. For example, a government may regulate the level of noise emitted by a sound truck, without regard to the message conveyed by the sound truck, to further its interest in protecting citizens from unwelcome noise. 109 S.Ct. at 2756-57. If the interest to be served by the regulation is based on the listeners' reaction to the speech, however, the purpose of the regulation is not content-neutral. Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992). The Court finds that the Recruiting Rule ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener.

C.

Defendants assert two interests supporting enactment of the Recruiting Rule: ensuring that athletes and non-athletes are treated alike; and preventing the exercise of undue influence on the student-athlete. (Defendant's Response To Motion For Partial Summary Judgment, at 73-75, 79 (Docket No. 45)). Thus, in enacting the ban, the TSSAA was apparently concerned that schools would be more interested in attracting student-athletes than other students, and consequently, school representatives would attempt to

"unduly" influence these student-athletes to attend. Thus, the ban was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by public and private school representatives outside the student's feeder pattern. The TSSAA's purpose in enacting the ban, then, indicates that the ban is not content-neutral.[14] Thus, Defendants must show that the ban is supported by a compelling governmental interest and is narrowly drawn. Arkansas Writers' Project, Inc., 107 S.Ct. at 1729; Bellotti, 98 S.Ct. at 1421.

The Court recognizes that the State has a compelling interest in ensuring that its children obtain a high quality education so that they may become productive, contributing members of society. That education may include a curriculum that exposes the student to a wide variety of academic subjects, interscholastic athletics, and extracurricular activities.[15] Ensuring that students maintain an appropriate balance between these activities and their "core" academic work is also a legitimate interest of the government. To that extent, the first interest asserted by Defendants has superficial appeal.

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[14] Even if the ban were content-neutral, it still would not be a valid time, place, and manner restriction because, as discussed more fully below, the ban burdens substantially more speech than is necessary to prevent harm to student-athletes. See also Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 1801, 123 L.Ed.2d 543 (1993) ("Assuming that a flat ban on commercial solicitation could be regarded as a content-neutral time, place, or manner restriction on speech, a proposition that is open to serious doubt," the ban does not "serve a substantial state interest in 'a direct and effective way.'" (citations omitted)).

[15] Students may receive academic credit for interscholastic athletics. Tenn. Bd. of Ed. Rule 0520-1-3-.06.

That interest is referenced in the Guidelines which follow the Recruiting Rule:

> 2. One key is not treating 'athletes' or 'prospective athletes' any differently than students who are not athletes.
>
> 3. Students should be seen as students and not singled out based on their potential athletic ability . . .
>
> * * *
>
> 7. High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year-old students in the same manner as college coaches view high school seniors.
>
> 8. Administrators and coaches must realize that they have more responsibilities than the general public to understand the purpose of high school athletics, the principles behind the TSSAA rules, etc., and to maintain a level of understanding and purpose when dealing with the general public and students.

To the extent that singling out a student based on his or her athletic ability would harm that student,[16] the State would have an interest in preventing that harm from occurring. Certainly, the State would have an interest in preventing a

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[16] There is no evidence in the record to support the conclusion that singling out students based on their school activities is harmful. Singling out talented student-athletes may well be beneficial rather than harmful.

student's athletic abilities or activities from resulting in an unfair advantage or an unfair disadvantage to the student. Both situations could affect the student's ability to benefit fully from his education.[17] Thus, to the extent that Defendants are asserting an interest in ensuring that athletics do not interfere with a student-athlete's ability to obtain a high quality education, they have asserted a compelling state interest.

Defendants also assert that the Recruiting Rule ban is designed to prevent "undue influence." Under Tennessee law, a plaintiff who seeks to invalidate a will based on undue influence on the testator must show "that one person, by threats, coercion or importunities, so exhausted the will of the other person to resist that the act taken by the weaker was not his or her own act but that of the person exercising the undue influence." Bills v. Lindsay, 909 S.W.2d 434, 440 (Tenn. Ct. App. 1993). A similar showing must be made to rescind a conveyance or a contract. See, e.g., Fritts v. Abbott, 938 S.W.2d 420, 421 (Tenn. Ct. App. 1996) (plaintiff must show that the weaker party made the conveyance while under the domination and control of the stronger party). Limited by these definitions, the Court agrees that the prevention of "undue influence" on a student is a valid state interest because conduct constituting "undue influence" could harm the student. In other words, the TSSAA has a substantial

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[17] The Court is not persuaded, however, that the State would have an interest in ensuring that students with certain talents are treated exactly the same as every other student. Pursuing this goal to its logical extreme would prevent schools from allowing talented orators to participate on the debate team, or from allowing talented musicians to play in the school band. By offering these extracurricular activities, the State has recognized that developing a student's particular talent enhances the quality of that student's educational experience.

interest in preventing a student from being threatened, coerced, or harassed.

On the other hand, the TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school.[18] In other words, it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side of the debate by suppressing the speech of the other. Turner, 114 S.Ct. at 2458-59; Belotti, 98 S.Ct. at 1420-21. The TSSAA cannot control school choice through censorship.

Having determined, however, that Defendants have a legitimate interest in protecting student-athletes from the specific harms identified above, the Court must determine whether the Recruiting Rule's ban is narrowly drawn to accomplish those goals. The answer is clearly no. The interests identified by Defendants are, at best, only marginally promoted by the ban, and "could be sufficiently served by measures less destructive of First Amendment interests." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980).

There is absolutely no evidence in the record that the Recruiting Rule ban was enacted in response to evidence that student-athletes were being harmed as a result of initial

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[18] The State's interest, in fact, is the reverse. The State has a profound interest in students making informed choices about education.

contact by school representatives, including the school's coaching staff. See Edenfield, 113 S.Ct. at 1800-01 (failure to present studies or anecdotal evidence substantiating State's allegations of harm belies government's argument that restriction directly and materially alleviates that harm). See also Ibanez v. Florida Dep't of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 2091, 129 L.Ed.2d 118 (1994) ("[w]e have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here.") It is difficult to imagine that a student-athlete would be harmed simply by hearing that a school outside his zone would be interested in him or her. It is difficult to imagine that a student-athlete who did not have the financial means to attend a private or parochial school would be harmed simply by an offer of financial aid that would allow him to attend the school.

There is also no evidence in the record that the ban prevents athletes from obtaining an "unfair" advantage over other students. In fact, the ban has the result of penalizing athletes by prohibiting them from being approached with offers of educational opportunities when schools may freely approach, and make offers to, students with other talents.[19] Student-athletes are being punished, rather than favored, for their talents.

Furthermore, Defendants have not explained the purpose for the feeder school exception. If conveying information to student-athletes about opportunities to attend out-of-zone

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[19] In that regard, the Court notes that listeners, as well as speakers, have First Amendment interests that deserve protection, interests that may be asserted by those who wish to reach those listeners. See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 1823 n.15, 48 L.Ed.2d 346 (1976).

schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of "feeder schools." The TSSAA cannot have it both ways.

Certainly, the TSSAA's legitimate interest in preventing harm to student-athletes can be better served by means less intrusive than the Recruiting Rule ban. For instance, fraudulent conduct and intimidation could be prohibited, and the TSSAA could require parental involvement, if necessary. See Schaumburg, 100 S.Ct. at 836-47; Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 2676, 101 L.Ed.2d 669 (1988). The Court agrees with Plaintiff that the Rule's ban has the effect of preventing any influence on a student, not just "undue" influence. The ban is simply not the "least restrictive means" for preventing harm to student-athletes. The TSSAA needs to go back to the drawing board and start over.

Thus, the Court concludes that the Recruiting Rule ban cannot be applied in a valid manner, and is therefore, facially unconstitutional. See, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984).

The ban also violates the First Amendment as applied to the facts in this case because there is no evidence that penalizing the conduct at issue here even remotely furthered the legitimate interests identified above. The letter sent by Coach Flatt invited students who had already signed enrollment contracts with the school to Spring football practices, advised the students that they were not required to attend the practices, and set forth the schedule for practices. The phone calls Coach Flatt made after sending the letter were simply to reiterate to the recipients that they should not

participate in practices if their participation conflicted with activities at the schools they were currently attending.

There is no evidence in the record to suggest that these students were, or were likely to be, harmed by receiving information about Plaintiff's Spring football practice. The Spring Practice Letter, and follow-up telephone calls, could not have constituted "undue influence" of the students to attend Brentwood Academy. The students who received the letters and calls had already contractually agreed to attend the school. Whatever influence the letters and calls had was "due," rather than "undue," given the legitimate need for a school to communicate such information to its students.

Furthermore, Defendants have admitted that the Recruiting Rule does not prohibit incoming students from participating in spring football practice at a school they plan to attend the next fall.[20] Therefore, the TSSAA has prohibited speech with regard to conduct it recognizes as lawful under the regulations. Defendants have asserted no legitimate justification for penalizing Plaintiff's communication about this admittedly legal activity.

Defendants also argue that the restriction is justified because the State may specify those who are allowed to speak under certain circumstances, citing Minnesota State Board For Community Colleges v. Knight, 465 U.S. 271, 104 S.Ct 1058, 79 L.Ed.2d 299 (1984); Cornelius v. NAACP Legal Defense Ed. Fund, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); and Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74

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[20] The Court notes the absurdity of TSSAA's position that coaches cannot contact students until they attend school for three days, but these same students can attend spring practice. How can a coach hold a practice with students that he or she cannot contact?

L.Ed.2d 794 (1983). These cases do not advance the analysis here because they all involve the extent to which the government may limit access to public property, or may limit access to government officials or employees by those wishing to express their views. The ban in this case does not limit access to public property or public officials or employees. It limits access by certain speakers to certain potential listeners. Indeed, by restricting the speech of coaches, it limits the most informed speakers on the subject of athletics. As discussed above, the First Amendment is much less tolerant of the restrictions involved here. See Belloti, 98 S.Ct. at 1420. (The government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.")

D.

Defendants also argue that even if the Rule's ban is content-based, it should be analyzed under the more relaxed scrutiny applied to "commercial speech" under the First Amendment. The Supreme Court has explained that "'the test for identifying commercial speech'" is whether the communication involves "the proposal of a commercial transaction." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 1513, 123 L.Ed.2d 99 (1993) (quoting Board of Trustees of State University of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

The Court is not persuaded that the ban in this case should be characterized as regulating only commercial speech. The ban is not limited to a school's advertisements and/or solicitations, but covers all speech by a school representative with a student until the student has attended the representative's school for three days. Indeed, as Plaintiff points out, the communication for which Plaintiff was

punished in this case did not involve solicitation or recruiting, but merely conveyed information about spring football practice to students who had signed enrollment contracts with the school. Furthermore, the ban also applies to coaches of public schools who seek to contact students attending schools that are not "feeder schools." Since public school students do not pay tuition, a student's enrollment in a particular public school would not constitute a"commercial" transaction. By the same token, it is not at all clear that a student's enrollment in a private school that provided a full scholarship to the student would constitute a "commercial" transaction. Thus, the Rule's ban does not limit purely commercial speech.[21]

Even if Defendants are correct in their characterization of the speech involved here, however, the ban does not survive even the more relaxed scrutiny accorded commercial speech regulations. Regulation of commercial speech is subjected to "intermediate" scrutiny under a framework set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 2375-76, 132 L.Ed.2d 541 (1995).[22] Under Central Hudson, commercial speech that concerns a lawful activity and that is not misleading may be

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[21] As the Supreme Court has pointed out, speech does not retain its commercial character "when it is inextricably intertwined with otherwise fully protected speech." Riley, 108 S.Ct. at 2677.

[22] Since Virginia Board of Pharmacy, 96 S.Ct. at 1817, the Court has held that accurate and non-misleading commercial messages are protected by the First Amendment. Only false, deceptive or misleading commercial speech may be banned. Ibanez, 114 S.Ct. at 2088.

Defendants do not contend that the ban is justified because it reaches only unprotected false, deceptive or misleading speech.

regulated if the government demonstrates that:[23] (1) it has a substantial interest in support of its regulation; (2) the restriction on commercial speech "directly and materially advances that interest;"[24] and (3) the restriction is "'narrowly drawn."[25] Florida Bar, 115 S.Ct. at 2376. Unlike rational basis review, this intermediate level of scrutiny does not

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[23] It is well established that the party seeking to uphold a restriction on protected commercial speech has the burden of justifying it. Ibanez, 114 S.Ct. at 2088 n.7. As the Supreme Court stated in Ibanez, 114 S.Ct. at 2089:

> The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'

(quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265, 2279, 85 L.Ed.2d 652 (1985)).

[24] Under the second prong of the Central Hudson test, Defendants must show that the regulation directly and materially advances the articulated interests. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 1509, 134 L.Ed.2d 711 (1996). Defendants may not rely on speculation and conjecture in making this showing, but "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield, 113 S.Ct. at 1800-01. In that regard, the Court has explained that "broad prophylactic rules may not be so lightly justified if the protections afforded by commercial speech are to retain their force." Zauderer, 105 S.Ct. at 2281.

[25] In Fox, 109 S.Ct. at 3034-35, the Court made it clear that commercial speech analysis does not require that the regulation meet the "least restrictive means test." Instead, there must be a "fit' between the legislature's ends and the means chosen to accomplish those ends. Id. See also 44 Liquormart, 116 S.Ct. at 1509.

permit the court "to supplant the precise interests put forward by the State with other suppositions." 115 S. Ct. at 2376.

As discussed above, the Court recognizes that the State has a compelling interest in preventing conduct that is harmful to a student-athlete. Also, as explained above, however, the ban does not directly and materially advance that interest, nor is it narrowly drawn. Accordingly, even if the ban could be construed as involving commercial speech, it would still violate the First Amendment.

Defendants cite Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) to support their argument that "a prohibition on the exercise of 'undue influence' in the context of commercial speech has been upheld under the First Amendment." (Defendants' Response To Motion For Partial Summary Judgment, at 79 (Docket No. 45). In Ohralik, the Ohio Supreme Court disciplined an attorney for approaching an 18-year old accident victim in the hospital, offering to represent her, and during a later visit, obtaining her signature on a contingent fee agreement. 98 S.Ct. at 1915-16. The attorney visited another victim of the accident, also 18-years old, at home and also secured her signature on a contingent fee agreement. Id. Ohralik was disciplined for violating a rule prohibiting a lawyer from recommending himself or his associates to one who has not sought his advice, and a rule that prohibits the acceptance of employment by a lay person to whom the attorney has given unsolicited advice. 98 S.Ct. at 1917 n.9. Neither of these rules used the phrase "undue influence."

The Ohralik Court held that the State does not violate the First Amendment by disciplining a lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 98 S.Ct. at 1915. In reaching its decision, the Court

determined that the State had a legitimate interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" 98 S.Ct. at 1921.

As explained above, this Court agrees that the TSSAA has an interest in preventing students from harmful solicitations involving fraud, undue influence, intimidation or overreaching, but Defendants have not shown that the Recruiting Rule ban properly accomplishes that goal. As the Supreme Court explained in a more recent case, this goal does not justify blanket bans on all personal solicitations: "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation." Edenfield, 113 S.Ct. at 1802. In striking down a ban on in-person solicitation by Certified Public Accountants, the Court in Edenfield made it clear that the Ohralik holding was limited: "Ohralik's holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." Id. (quoting Zauderer, 105 S.Ct. at 2277). The "unique features" of the in-person solicitation in Ohralik were that a lawyer, who "is trained in the art of persuasion," personally solicits an "unsophisticated, injured, or distressed lay person" and seeks the person's immediate acceptance of a retention agreement. Id.

Unlike Ohralik, there is no evidence in the record that a student's parents, who must make the ultimate decision about which school their child will attend, would be vulnerable to, and oppressed by, school representatives, or that there would be pressure to make a decision on the spot. See Edenfield, 113 S.Ct. at 1803 (". . . Ohralik in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the

preventative measure it proposes will contribute in a material way to solving that problem.")

Moreover, the facts in this case are that the Spring Practice Letter, and follow-up calls, all went to students who had already contractually agreed to attend Brentwood Academy. The students and their parents had already selected Brentwood Academy, and therefore, there was no opportunity for solicitation, much less undue influence, as in Ohralik. Accordingly, Ohralik does not support the constitutionality of the ban involved here.

E.

Even if the Recruiting Rule ban were not content-based, it would still run afoul of the First Amendment for another reason. By using the phrase "appropriate or normal" to define the already imprecise term "undue influence," the TSSAA retains unbridled discretion to penalize those expressing points of view with which it disagrees. Forsyth County, 112 S.Ct. at 2401-02.[26] Indeed, the TSSAA invoked these vague terms in finding Plaintiff in violation of the Recruiting Rule, but did not explain how the students involved were harmed. See Exhibit A to Complaint (Docket No. 1) ("This entire process [sending letters and calling those who had signed enrollment contracts] is seen as beyond what is normal and appropriate and is undue influence.")

The word "appropriate" is defined in Webster's Third New International Dictionary as "specially suitable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1993). The word "normal" is defined as "according to,

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[26] That the TSSAA allows members to seek advice about how the Recruiting Rule will be interpreted does not eliminate the discretion it retains to apply those subjective terms in an arbitrary fashion.

constituting, or not deviating from an established norm, rule, or principle." Id. at 1540. Neither of these definitions sheds any light on how to determine an "established norm," or to whom the conduct must be "specially suitable." Nor do they add any precision to the phrase "undue influence." Accordingly, the TSSAA is free to use the Recruiting Rule to arbitrarily suppress speech in violation of the First Amendment.[27]

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[27] Because the Court has determined that the Recruiting Rule is unconstitutional by violating the First Amendment, it is unnecessary to address Plaintiff's argument that the Rule also violates its substantive due process rights under the Fourteenth Amendment because it is void for vagueness. The Court is persuaded, however, that the terms "appropriate," "normal," and "undue influence" would also be unconstitutionally vague for purposes of the Fourteenth Amendment. These terms have "no settled usage or tradition or interpretation in law." Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 2731, 115 L.Ed.2d 888 (1991). Consequently, the Rule fails to provide "fair warning" to those to whom it is directed, and is so imprecise as to present a real "danger[] of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The Rule prohibits the use of "undue influence," and that phrase, by its very nature, requires further explanation. The TSSAA defines the phrase "undue influence" by raising and answering five sets of questions and promulgating guidelines. It is unclear if the explanations expand the scope of the Rule, or if the Rule limits the expansive prohibitions that follow it.

In any event, the first question and answer used to define "undue influence" only makes matters worse. The TSSAA defines "undue influence" as "exceeding what is appropriate or normal." The phrase "appropriate or normal" could not be more vague. The words "appropriate" and "normal" are among the most relative terms in the English language. "Appropriate" or "normal" compared to what?

These profound defects could perhaps be ameliorated if

(continued...)

F.

In summary, the Court has determined that the Recruiting Rule violates the First Amendment on its face and as applied, and that Plaintiff is entitled to summary judgment as to Count I. Defendants are hereby enjoined from any use of the Recruiting Rule.[28]

Having found the Recruiting Rule unconstitutional, all sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 23, 1997 letter from the TSSAA to Brentwood Academy (Exhibit G to Complaint (Docket

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[27] (...continued)
"appropriate or normal" was clearly defined. However, nowhere in the Rule is the phrase "appropriate or normal" defined. Any yet, to further complicate matters, the TSSAA emphasizes the importance of the "appropriate or normal" standard by stating in its "Guidelines For Understanding The 'Recruiting Rule' and Understanding 'What Is Undue Influence:'"

> The major theme of the "recruiting rule" is not "initial contact." The major theme is "exceeding what is normal and appropriate." Initial contact can be a violation, but is only one of *many* things that can exceed what is normal and appropriate.

(emphasis added). Despite this statement, a major theme of the Recruiting Rule is vagueness.

The phrase "appropriate or normal" adds nothing to the definition of "undue influence," and is essentially meaningless. This vague Rule permits the TSSAA to engage in arbitrary and discriminatory enforcement — precisely, the claim made by Brentwood Academy in this case.

[28] Thus, the Court need not address whether the Recruiting Rule violates substantive due process standards because it permits a member school to be punished for the conduct of someone unconnected with the member school.

No. 1)) are void and unenforceable. The sanctions imposed are not itemized by type of violation. Therefore, to ensure that the First Amendment is not violated, all sanctions must be set aside.

VI. Fourteenth Amendment: Procedural Due Process

Plaintiff alleges, in Count III of its Complaint, that Defendants' actions have violated Plaintiff's Fourteenth Amendment rights to procedural due process. For purposes of its Motion for Partial Summary Judgment, Plaintiff argues two specific procedural due process rights which were allegedly violated by Defendants: (1) the right to a neutral, impartial and detached decision maker and (2) the right to confront and cross-examine adverse witnesses.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Thus, the Court must first determine whether Plaintiff has been deprived of a property or liberty interest protected by the Constitution. Plaintiff asserts that it has property interests in both the fine assessed against it by Defendant and the contract rights to which it is entitled as a member of the TSSAA. Plaintiff further asserts that it has liberty interests in its reputation and opportunities for attracting students and raising funds for the school.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests — property interests — may take many forms." Id., 408 U.S. at 576, 92 S.Ct. at 2708. Property interests are not created by the Constitution. Rather they are created and

their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules of understandings that secure certain benefits and that support claims of entitlement to those benefits. Id., 408 U.S. at 577, 92 S.Ct. at 2709.

The Court finds that Plaintiff, at a minimum, has a property interest, in the $3,000 fine assessed against it by the TSSAA.[29] Accordingly, the Court need not address, at this time, Plaintiff's other asserted constitutionally-protected rights. Plaintiff was entitled to the constitutional protections of procedural due process in this case.

There are clear issues of fact, however, as to what process Plaintiff was given and whether that process was sufficient to meet the requirements of the Fourteenth Amendment. For example, there are genuine issues of material fact as to the extent of Defendant Carter's involvement and influence beyond the initial fact-finding investigation in this case. See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶ 9. There are genuine issues of material fact as to whether the second appeal, to the TSSAA Board of Control, was truly a de novo review. Id., ¶ 10. There are genuine issues of material fact as to whether bias or prejudgment played any part in the decision making process. Id., ¶¶ 9, 10, 15. There

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[29] See, e.g., G&G Fire Sprinklers, Inc. v. Bradshaw, 136 F.3d 587 (9th Cir. 1998) (subcontractor had due process property interest in money withheld by state); Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York, 1994 WL 455553 (S.D. N.Y. Aug. 19, 1994) (property interest in money allegedly exacted for payment of fines for traffic violations); Jones v. Cowley, 1991 WL 252667 (10th Cir. Nov. 26, 1991) ("Certainly, there is no doubt that the $15 fine is a deprivation of a property interest."); Murray v. Dosal, 1998 WL 385915 (8th Cir. July 13, 1998) (inmate has property interest in money received from outside sources).

are genuine issues of material fact as to whether Plaintiff was given meaningful opportunities for confrontation and cross-examination of adverse witnesses. Id., ¶ 11, 12; Defendants' Local Rule Response (Docket No. 46), ¶¶ 51, 95, 98.

Accordingly, Plaintiff's Motion for Partial Summary Judgment, on the issue of procedural due process, is DENIED.

VII. Defendants' Motion for Summary Judgment

Also pending before the Court is Defendants' Motion for Summary Judgment (Docket No. 47), in which Defendants seek judgment on Plaintiff's federal and state law claims, with the exception of the antitrust claims.

Defendants contend that, because they are not "state actors," they are entitled to summary judgment on Plaintiff's constitutional claims. For the reasons stated above, the Court has found that Defendants are "state actors" and, therefore, Defendants' Motion for Summary Judgment on this issue is DENIED.

In addition, Defendants argue they are entitled to summary judgment on Plaintiff's state law claims. Tnose claims are set forth in Counts V and VI of Plaintiff's Complaint (Docket No. 1).

In Count V, Plaintiff alleges a cause of action for equitable estoppel. Defendants contend that none of the acts alleged by Plaintiff are sufficient to create an equitable estoppel under Tennessee law. What both parties overlook is the fact that there is no cause of action for equitable estoppel under Tennessee law. Val-Land Farms, Inc. v. Third Nat'l Bank in Knoxville, 937 F.2d 1110, 1115 (6th Cir. 1991).

Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's purported claim of equitable estoppel (Count V) is GRANTED, and that claim is DISMISSED.

In Count VI, Plaintiff alleges a cause of action for "unfair, unreasonable, arbitrary and oppressive action" in violation of Plaintiff's rights under state law. Defendants contend that they are entitled to summary judgment on this claim because their actions with regard to Plaintiff were conducted in good faith and that the Court should not interfere with the internal affairs of a voluntary association. Whether Defendants' actions were unfair, unreasonable, arbitrary and oppressive or whether they were taken in good faith all raise genuine issues of material fact. See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts (Docket No. 70), ¶¶ 9, 10, 11, 12, 15. Whether TSSAA is a voluntary association is a disputed issue of fact. Id., ¶¶ 2, 4, 44. The parties clearly disagree as well about what actions were taken, what motivated those actions, and what resulted from those actions. Accordingly, Defendants' Motion for Summary Judgment with regard to Count VI is DENIED.

VIII. Conclusion

For the reasons described above, Brentwood Academy's Motion for Partial Summary Judgment and for Permanent Injunction (Docket No. 27) is GRANTED in part and DENIED in part. Brentwood Academy's Motion is GRANTED as to its claim that TSSAA's Recruiting Rule violates the First Amendment on its face, and as applied to Brentwood Academy. Accordingly, Defendants are hereby enjoined from any use of the Recruiting Rule. All sanctions imposed by the TSSAA on Brentwood Academy pursuant to the August 27, 1997 letter from the TSSAA to Brentwood Academy (Docket No. 1, Ex. G) are void and unenforceable.

Defendants' Motion for Summary Judgment (Docket No. 47) is GRANTED in part and DENIED in part. Defendants' Motion is GRANTED as to Plaintiff's equitable estoppel claim and that claim is DISMISSED.

It is so ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0323P (6th Cir.)
File Name: 99a0323p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,
Plaintiff-Appellee,

No. 98-6113

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION; RONNIE CARTER, Executive Director And Individually,
Defendants-Appellants.

Filed: August 30, 1999*

Before: GUY, SUHRHEINRICH, and GILMAN, Circuit Judges.

ORDER

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*This order was originally issued as an "unpublished order" filed on August 30, 1999.

This matter is before the Court upon Brentwood Academy's petition for rehearing *en banc*. Having failed to achieve the requisite number of votes to sustain the request for rehearing, the petition has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. However, the panel will briefly address Brentwood Academy's argument that our decision is in conflict with earlier Sixth Circuit cases.

Because we have already addressed the cases of *Burrows v. Ohio High School Athletic Association*, 891 F.2d 122 (6th Cir. 1989), *Yellow Springs v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981), and *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985), in our published opinion, we find no need to comment any further on those cases. As to *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1978), *Hamilton v. TSSAA*, 552 F.2d 681 (6th Cir. 1976), and *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973), they all pre-date the *Blum* trilogy. *See Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982). The *Blum* trilogy establishes the current standard for determining when a private party's conduct can be considered state action and supercedes the earlier decisions in *Cape*, *Hamilton*, and *Morris*. Because of this, those cases were not discussed in our opinion.

Accordingly, the petition is denied.

MERRITT, Circuit Judge, separate statement on denial of rehearing en banc, in which Clay, Circuit Judge, joined. Although a substantial minority of the active judges of our

court have voted for en banc review of this case, unfortunately, there was not a majority. This is an important case because all high school interscholastic athletic contests in the states of the Sixth Circuit and in almost all other states in the country are conducted in similar fashion by athletic associations like the TSSAA.

Our court should grant en banc review in this case on the issue of whether the TSSAA --- the agency delegated the authority to control all high school athletic contests in Tennessee --- is engaged in "state action" under the Fourteenth Amendment. It should do so because our panel's holding that TSSAA is not a "state actor" contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action. Under the panel's theory that such statewide athletic associations are not state actors, and hence not subject to fourteenth amendment restraints, the TSSAA could maintain a racially segregated system of interscholastic high school athletics like the one declared invalid in *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 227 (5th Cir. 1968) (*private* black high school sued LHSAA and the court held "there can be no substantial doubt that conduct of the affairs of LHSAA is state action in the constitutional sense"), or refuse to allow girls to participate in interscholastic high school athletics, *see Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (suit by a student to test gender regulations of AIA and the court held that "AIA regulations in question [respecting gender] meet the state action requirement of the fourteenth amendment"). The panel's decision that TSSAA is not a state actor is also inconsistent with at least four other circuit court decisions. The Third, Seventh, Eighth, and Tenth Circuits have also held that high school interscholastic athletic association are state actors. *See Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121,

125 (3d Cir. 1978); *Griffin High School v. Illinois High School Athletic Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United States, ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Oklahoma High School Athletic Ass'n v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963). In addition, all of the several state supreme courts which have addressed the question have held that their high school interscholastic athletic associations are state actors. I find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts.

In addition the panel's decision appears to be inconsistent with the Supreme Court's language in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 193 (1988), quoted below, citing with approval the Louisiana and Arizona cases mentioned above:

> Those institutions [of higher education], the vast majority of which were located in states other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular state. [13]
>
> > [13] The situation would, of course, be different if the membership consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign. *See Clark v. Arizona Interscholastic Ass'n*, . . . [and] *Louisiana High School Athletic Ass'n v. St. Augustine High School*. . . .

The panel's decision also appears to be inconsistent with our court's ruling in *Alerding v. Ohio High School Athletic Ass'n*,

779 F.2d 315, 316 n. 1 (6th Cir. 1985): "OHSAA is a state actor for purposes of § 1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic athletic activities."

The panel's decision seems clearly inconsistent with the theory of state action set out in *West v. Adkins*, 487 U.S. 42, 55-56 (1988). There a unanimous Court said that state action analysis requires a "functional" analysis of the activity of the private individual or agency in question to determine the degree of "cooperation" between state and local officials and the actor and an analysis of the degree of "coercion" exercised by the actor over persons under the control of a state or local governmental institution. Our panel made no effort to analyze the cooperative relationship between TSSAA and the state's public high schools or the coercive power of TSSAA. The fact is that TSSAA establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee. Its board consists entirely of public school officials. Its funding comes from receipts from the athletic contests of public schools. The state delegates to TSSAA its authority to collect and retain gate receipts from public interscholastic contests. The state has chosen to allow its athletic fields and gyms to be used in this way. It has chosen to make TSSAA its agent for controlling an important, highly visible component of its statewide educational program --- inter-school athletics.

The Tennessee Department of Education delegates all of its plenary authority to control high school athletics to TSSAA. TSSAA has run high school interscholastic athletics with an iron hand for most of this century. For the most part, it has done a very good job; but under the panel's ruling that the fourteenth amendment does not apply to TSSAA because it is not a state actor, TSSAA could rule ineligible for competition

high school athletes on the basis of race, gender, national origin, or religion. It could disqualify, suspend or otherwise punish high schools and their students without notice and without a statement of reasons or a hearing or the other procedural protections provided by the due process clause.

Because our panel's decision is inconsistent with the basic authorities on state action, and with the well-established legal theory underlying their holdings, I dissent from our failure to grant en banc review of this case. We have created an unnecessary conflict in the circuits on an important question of constitutional law. The conflict will have to be remedied now by the Supreme Court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in this case, are the First and Fourteenth Amendments, as enforced by the federal civil rights statute, 42 U.S.C. § 1983.

The relevant portion of the First Amendment provides:

> Congress shall make no law...abridging the freedom of speech.

The relevant portion of the Fourteenth Amendment provides:

> No state shall...deprive any person of life, liberty, or property without due process of law.

The relevant portion of the civil rights law, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

NO. 98-6113
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,

Plaintiff/Appellee,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION
and RONNIE CARTER, Executive Director and Individually,

Defendants/Appellants.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRIEF OF AMICI CURIAE CHESTER E. FINN, JR. AND DANIEL CASSE IN SUPPORT OF PLAINTIFF/APPELLEE BRENTWOOD ACADEMY'S PETITION FOR REHEARING *EN BANC* *

* This brief was filed in support of Brentwood Academy's Petition for Rehearing *En Banc* but was not accepted for filing pursuant to Rule 29(e), Federal Rules of Appellate Procedure.

We file this statement as individuals, on our own behalf. We are not lawyers but policy analysts long interested in education matters, and particularly in issues relating to accountability of public education systems and officials and to access to quality educational opportunity for all students. The panel decision in this case has been brought to our attention, and we want to share with the full Court our perceptions and concerns about what we regard as an important case and what seems to have been a most cursory treatment of serious matters by the panel opinion.

We should identify ourselves, although we reiterate that we speak on our own behalf and not as representatives of any organization or group (although we do think of ourselves as speaking, as we often have, on behalf of the cause of education accountability, access and quality).

Chester E. Finn, Jr. is the President of the Thomas B. Fordham Foundation, which is officed in Washington D.C. and does much of its work in Dayton, Ohio. The Foundation supports research on national education issues, including accountability and access. It widely disseminates the results of this research to policymakers, civic leaders and influential educators. In the Dayton area, where the Foundation has historical roots, it supports education activities designed to boost school quality, accountability, parent information and choice, particularly for disadvantaged youngsters heretofore trapped in unsatisfactory schools. Dr. Finn holds the bachelors, masters and doctorate degrees from Harvard University and has devoted his career to educational policy issues.

Dr. Finn has been involved in public service ranging from serving as an aide to Daniel Patrick Moynihan when Mr. Moynihan was Ambassador to India and U.S. Senator to

serving as Assistant Secretary of Education for Research and Improvement under Education Secretary William Bennett, with whom Dr. Finn is currently co-authoring a book on education (a parents' guide). For many years, Dr. Finn was affiliated with Vanderbilt University and the Hudson Institute and is now affiliated with the Manhattan Institute. Dr. Finn was also a founding member of the Edison Project, headed by former Yale University President Benno Schmidt, which designed alternative models for schools. Dr. Finn has done research on and is an expert on charter schools. He is also in the final stages of a book on that topic.

Daniel Casse is a senior director of the White House Writers Group, a public policy and strategic planning group. Mr. Casse received the bachelor's degree from the University of Toronto and his masters in public administration degree from the Kennedy School of Government Harvard University. He has served in the White House as special assistant to President Bush for Cabinet Affairs. Previously he had worked for William Bennett at both the U. S. Department of Education and National Office of Drug Control Policy. A former managing editor of The Public Interest, a public policy quarterly, his writing on politics and public policy has appeared in The Wall Street Journal, Commentary, and Policy Review. During the 1996 presidential campaign, Mr. Casse was a senior policy advisor to candidates Lamar Alexander and, later, Bob Dole.

I. The Reason for Concern: What This Case Is Really About

While we are not constitutional scholars, we are scholars and policy analysts with strong interests in the area of public school officials' accountability for, and young people's access

to quality educational opportunity. We are concerned that the panel opinion in this case misperceived the importance of the issues raised and tended to view the case -- somewhat dismissively -- as merely a high school sports case. As non-lawyers, we have great reverence for our judicial system, and indeed the sister of one of us is a judge herself. So we are quite sympathetic to what seems to be the panel's concern about the potential for heavy-handed judicial intervention in seemingly private matters of scant public consequence. In particular, we applaud the panel's general instinct that courts should not reach out to constitutionalize everyday behavior in the private realm. We concur that preserving a private realm beyond the scope of constitutional intrusion is an important value. Our concern is not with that principle underlying the panel's decision but with its application in the context of this case.

To state the point boldly, we think that the panel judged this book by its cover without peering very far inside to see what was written there. The symptoms are clear.

The very first paragraph of the panel's background discussion of the case is all about Brentwood Academy's athletic prowess. The panel self-evidently saw the case as one involving a "high school football powerhouse." The panel noted that the school's football team had been nationally ranked by USA Today, stated what the school's football record had been over the past 28 years, and noted that the school had won many statewide championships. The panel further noted that the school's "basketball team is also well known in athletic circles." (Slip Op. at 3). Near the end of the opinion, the panel noted the problems associated with the enforcement of the rule in question but placed emphasis on resolution of the dispute within the TSSAA rather than in federal court, indicating that

the court should not play the role of "super referee[] over high school athletic programs." (Slip Op. at 14).

This emphasis on considerations of "arbitrary enforcement" of "vague" rules led the panel to view this as a case about "eligibility for competition" in sports and that, so viewed, the issues were "not of constitutional magnitude." Id. The panel treated this entirely as a dispute about the arbitrary application of some rules and refused to intervene in what it regarded an internecine dispute about a matter of little constitutional or policy import. But our understanding is that the case far transcends the particulars of the dispute at issue. The District Judge held the rule in question unconstitutional not only as it applied in this particular case but on its face as it would apply in any case. That is the aspect of the dispute that has gotten our attention, since we have no interest ourselves in entering into a dispute about allegedly arbitrary enforcement of a sports-eligibility rule.

But to view this case in that way is fundamentally to misperceive what is at stake. This is not just a case about arbitrariness in formulating or applying a rule regarding the eligibility of athletes. That would be like saying that *Marbury v. Madison* was just a case involving the question of whether a particular judge should get his commission. It is true as far as it goes, but it does not go very far in fact and does not get to the true significance of the case. Just as the bus desegregation cases did not just involve the question whether the seats in the front of the bus were superior in some way (more convenient?, more comfortable?) to the seats in the rear, this case does not only deal with athletic eligibility.

Rather, this is a case involving fundamental First Amendment freedoms, which in this case arise in an athletic

context but which go to the heart of issues relating to access to quality education and school choice. Also, it is a case involving accountability of public school officials who seek to avoid this accountability by coming together in a nominally private association that they run and whose very purpose is to exercise explicit or implicit authority delegated to it by the state (which in Tennessee as in every other state is obliged under state constitutions not only to pay for but actually to provide educational services to its citizens).

II. The Accountability Concern

As we understand the constitutional doctrine, a finding of "state action" is an analytical prerequisite to subjecting conduct to constitutional scrutiny. As non-lawyers, we generally support the preservation of a private sphere beyond the scope of constitutionalization. But it strikes us as naive and simplistic to view these high school athletic associations as private, like a coaches' association, teachers' union or book club. From Brentwood Academy's Petition for Rehearing *En Banc*, we understand that every other jurisdiction that has decided the issue has concluded that these statewide high school athletic associations operate under the "color of" state law. The Petition makes quite a strong claim, and on general grounds it seems prudent for the entire Court to review a panel decision that seems out of sync with so much (and one-sided) precedent. Moreover, it seems that the panel decision faced conflicting precedent within the Sixth Circuit itself and tried to steer a path around some precedential debris. But its efforts in that regard do not seem especially successful to us as policy analysts, with the result that more rather than less uncertainty exists. The panel, as we understand it, is institutionally constrained in ways that the *en banc* Court is not. Resolving these uncertainties and establishing uniformity within the

Court's area of jurisdiction would seem to be an important and worthwhile goal.

From a broader policy perspective, we view with some alarm the implications for educational accountability of what we understand to be the import of the panel's decision. This is how we understand the state of the law from the panel's opinion. Public school principals join together to form an association that they label private. The mission of the organization is to regulate interscholastic athletics for the entire state. The association invites private schools to become members, and they comprise about 15% of the organization. The principals sit in their capacity as public school principals; the public school members pay dues to support this organization and the public school members make and enforce the rules. The public schools in turn agree to abide by the rules promulgated by this association and in their official interscholastic athletic activities implement these rules. These rules involve all interscholastic athletic activities in the state, which are an important extracurricular part of the educational mission of these public schools (and the state is obliged by its state's constitution to provide public education to its citizens). Moreover, for 24 years the State Board of Education explicitly delegated authority to this association to regulate interscholastic activities and, since 1996 when that explicit delegation was revoked, has continued to maintain the same relationship in fact with the association that it had for those 24 years. Under the panel opinion, the composition and control of the association apparently does not matter at all, since those issues are not discussed. And, at the state level, what seems like an empty formalism (the revocation of the explicit delegation) is given determinative effect since the panel opinion does not even purport to delve into the underlying functional realities.

In the education field, many of us have advocated the use of student testing to assure and measure quality. This is part of the educational accountability movement. Testing can be controversial because what is tested can influence what is taught. Control of testing is an essential component of accountability. Now imagine if the public school history teachers of Tennessee got together to form a private association to regulate the history curriculum of the state, inviting some private school history teachers into the association. The association establishes a history curriculum and develops a test that all students must pass if they are to be certified as high school graduates. All secondary schools in the state pay dues to this association and all of them, public and private alike, agree-with the blessing of state officials-to implement the curriculum and the testing regime adopted by this "private" history teachers association. Would the conduct of that association be beyond the scope of accountability because of its nominal status as a "private" organization? If so, this is a recipe for placing core issues of public education policy and quality beyond the sphere of public accountability.

Our sense is that the better approach, which apparently is the approach of every other jurisdiction that has dealt with this matter, is to hold these associations to constitutional accountability but, where the issues do not relate to such core values as those protected by the first amendment, to defer as a matter of substantive law to the decisions reasonably taken by these associations -- but not to eliminate accountability entirely. In any event, this matter is of sufficient general importance to warrant review by the Court *en banc*.

III. The Concern About Access to Quality Education

A particularly troubling aspect of the TSSAA regulation subject to challenge in this litigation is the attitude it expresses about the availability of educational opportunity for youngsters who might be attracted to a school such as Brentwood Academy. The District Court well captured the appropriate role of government in situations such as this. It is not in preventing the flow of information to potential students or their families, even if, when informed, those students choose to leave public schools and opt for private. It is an abuse of the first amendment for TSSAA, governed exclusively by a group of public school principals, to restrict communication -- the speaker's right to communicate information and the student's right to receive information -- on the educational opportunities available. This is particularly true when, as here, what motivates the restriction on speech is the fear that the listener will indeed act on the basis of that information.

The District Court properly understood the state's interest as prohibiting coercion or fraud, not eliminating any information that could inform school choice. How are students and their families to learn about private school opportunities -- and yes, financial aid opportunities as well - unless such information is broadly and freely available? How can government or TSSAA, which operates under color of law, justify a freeze on targeted school-initiated communication with prospective students? As the District Court found, it cannot. We would welcome a targeted set of restrictions that would enhance choice and opportunity by eliminating pressure tactics and other encumbrances to choice. But a flat-out ban on targeted school-initiated communication is entirely inappropriate.

Further, the concern about students and their families learning about private school options is thoroughly at odds with the first amendment's guarantee that communication and information inform choice, but that choice regarding speaker and subject matter remains with the speaker and listener. And, consistent with the first amendment, government has no legitimate interest in stifling school choice by restricting the flow of helpful and truthful information. Government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in athletics just cannot be an appropriate or legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The District Court saw this point, but it seems not to have reached through to the deliberations of the panel that decided the appeal in this case.

Extracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds. The opportunity to attend a private school such as Brentwood Academy, with its emphasis on college preparation and admission (one of its swimmers was admitted to Yale this year), cannot be realized unless potential students and their families have access to information about curricular and financial-aid activities. If schools are interested in a youngster's talents -- whether curricular or extracurricular -- it is not the business of government to suppress speech so that a youngster is kept in the dark about educational choices that may be available to him or her. Surely, keeping a prospective varsity athlete in the dark to assure his or her playing for a public school athletic program is an insufficient basis for imposing a blackout on school-initiated targeted

communications. The first amendment guards against that type of censorship (while allowing for regulation of coercive conduct).

In addition, extracurricular activities constitute an integral component of an overall education for most youngsters. The panel decision seemed to regard interscholastic athletics as entirely distinct from education. This is incorrect. Students learn in different ways, but one essential ingredient is motivation. While valuable in themselves for such lessons as leadership skills and physical well-being, extracurricular activities such as athletics are important as a way of motivating young people. Many athletes who stay in school or progress into a university setting may have been encouraged to study because of their interest in sports, but learning and the pursuit of knowledge can be infectious. Athletics can provide the exposure to ideas and the motivation to learn. They, like art, drama, and journalism, can serve as the hook to get the attention of students and rivet it on the core curricular mission of the schools.

The hostility to students' access to choices in selecting their secondary school is palpable in the regulation under challenge. And the particular method of resisting access to educational quality through choice -- the suppression of speech -- is peculiarly odious in a democratic society because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools. But children are not the property of the state, and government cannot stifle access to educational opportunity through censorship.

These are important national issues in education, and they far transcend the characterization of the issues as described in the panel opinion. As we understand it, these free speech

claims could have been brought even in the absence of a specific episode, so the concern about judicial micromanagement of sports eligibility questions is not really the core question here. Accountability of public education officials, and access to information that allows informed educational choice and access to quality education are the critical issues in this litigation. We worry that the panel never got beyond the fact that Brentwood Academy is a football "powerhouse" to a consideration of just how significant the issues in this matter are to core educational values now being debated nationally. For these reasons, review of this matter by the Court *en banc* is highly desirable.

Respectfully submitted,

/s/_____
Chester E. Finn, Jr.

/s/_____
Daniel Casse